United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1910.

No. 2193.

754

SOUTHERN SURETY COMPANY, A CORPORATION,
APPELLANT,

vs.

GEORGE BAGLIN.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED JULY 18, 1910.

Argued Dec. 6/1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1910.

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SOUTHERN SURETY COMPANY, A CORPORATION, APPELLANT,

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 6, 1910.

In the Court of Appeals of the District of Columbia.

No. 2193.

SOUTHERN SURETY COMPANY, a Corporation, Appellant,
vs.
GEORGE BAGLIN.

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a Supreme Court of the District of Columbia.

No. 50002. At Law.

GEORGE BAGLIN, Plaintiff,
vs.
SOUTHERN SURETY COMPANY, a Corporation Organized and Existing under the Laws of Oklahoma, Having an Office and Doing Business in the District of Columbia, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed December 3, 1907.

In the Supreme Court of the District of Columbia.

Law. No. 50002.

GEORGE BAGLIN, Plaintiff,
vs.
SOUTHERN SURETY COMPANY, a Corporation Organized and Existing under the Laws of Oklahoma, Having an Office and Doing Business in the District of Columbia, Defendant.

1. The plaintiff, George Baglin, sues the defendant, Southern Surety Company, for money payable by the defendant to the plaintiff for that whereas heretofore, to wit, on the 10th day of July, 1907,

at the City of Washington, District of Columbia, the defendant, Southern Surety Company, by its certain writing obligatory, sealed with its seal and now shown to the Court, the date whereof is a certain day and year above mentioned, to wit, the day and year aforesaid, acknowledged itself to be held and firmly bound unto the said plaintiff in the sum of forty-five thousand dollars ($45,000) to be paid to the said plaintiff, his heirs and assigns, at its office in the City of New York, yet the said defendant, although requested so to do, hath not as yet paid the said sum of forty-five thousand dollars ($45,000) nor any part thereof to the said plaintiff, but hath
2 hitherto wholly neglected and refused and still neglects and refuses so to do; and the plaintiff claims the sum of forty-five thousand dollars ($45,000), with interest at the rate of six per cent. per annum from the 25th day of September, 1907, until paid, besides costs of suit.

2. The plaintiff further sues the defendant for money payable by the defendant to the plaintiff for that whereas heretofore, to wit, on the 10th day of July, 1907, at the City of Washington, District of Columbia, by its certain writing obligatory, sealed with its seal and now shown to the Court, the date whereof is a certain day and year therein mentioned, to wit, the day and year aforesaid, acknowledged itself to be held and firmly bound unto George Baglin in the sum of forty-five thousand dollars ($45,000) to be paid to the said Baglin, his heirs and assigns, at its office in the City of New York, which said writing obligatory was and is subject to a certain condition thereunder written, whereby, after reciting to the effect following, to wit, that "Whereas, The said George Baglin has loaned, or is about to loan to Garrett B. Linderman, of South Bethlehem, Pennsylvania, United States Government bonds known as "Old 4's," of the par value of Forty-five thousand dollars ($45,000.) redeemable after July 1, 1907, and

Whereas: the said Linderman has promised that he will return to the said Baglin the aforementioned securities, on or before September 25, 1907," it was conditioned that if the said Garrett B. Linderman, his heirs, executors and administrators, should and did
3 return to the said George Baglin, his executors, administrators and assigns, the said above mentioned securities, on or before said 25th day of September, 1907, then that obligation should be void; otherwise to remain in full force and effect, as by the said writing obligatory and the condition thereof will more fully and at large appear; yet said Garrett B. Linderman did not, in accordance with the terms of said bond, return and hath not, although often requested so to do, as yet returned the said Government Bonds, or any part thereof, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do. The said Government Bonds are of great value, to wit, forty-five thousand dollars ($45,000). By reason of which said breech, the said writing obligatory became forfeited, and thereby an action hath accrued to the said plaintiff to have and demand of and from the said defendant the sum of forty-five thousand dollars ($45,000). Yet the said defendant hath not, although often requested so to do, as yet paid the said sum of money

above demanded, or any part thereof, to the said plaintiff, ... hitherto wholly neglected and refused, and still neglects a... to pay the said sum or any part thereof to the said plaintiff; and... plaintiff claims the sum of forty-five thousand dollars ($45,000) with interest at the rate of six per cent per annum, from the 25th day of September, 1907, until paid, besides costs of this suit.

BLAIR AND THOM,
Attorneys for Plaintiff.

4 *Notice to Plead.*

The defendant is to plead hereto on or before the 20th day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof, otherwise judgment.

BLAIR AND THOM,
Attorneys for Plaintiff.

COUNTY OF NEW YORK,
State of New York, ss:

I, George Baglin, being first duly sworn, do, on oath, depose and say that I am the George Baglin who is named as plaintiff in the annexed declaration, which declaration is hereby referred to and made a part hereof; that the Southern Surety Company, a corporation organized and existing under the laws of Oklahoma and having an office and doing business in the District of Columbia, being the Southern Surety Company which is named as defendant in the annexed declaration, is indebted to me in the sum of forty-five thousand dollars ($45,000) with interest at the rate of six per cent. per annum from the 25th day of September, 1907, until paid, and I have a just cause of action against it for that amount, and the facts upon which said cause of action is based are as follows:

On or about the 10th day of July, 1907, one Garrett B. Linderman and the Southern Surety Company delivered to me a bond,
5 said bond being in the words and figures following, to wit:

Know all men by these presents:

That the Southern Surety Company, a corporation organized and existing under the Laws of Oklahoma Territory, with its principal office and place of business in the City of Denison, State of Texas, and an office and regular place of business in the City of Washington, District of Columbia (herein called the Company) is held and firmly bound unto George Baglin of the City of New York, in the sum of Forty-five thousand dollars ($45,000) to be paid to the said George Baglin, his heirs and assigns, at its office in the City of New York, the payment whereof well and truly to be made and done, the said Company binds itself, its successors and assigns firmly by these presents, sealed with its seal and dated this 10th day of July 1907.

Whereas, The said George Baglin has loaned, or is about to loan to Garrett B. Linderman, of South Bethlehem, Pennsylvania, United States Government bonds known as "Old 4's," of the par value of

forty-five thousand dollars ($45,000.) redeemable after July 1, 1907, and

Whereas: the said Linderman has promised that he will return to the said Baglin the afore-mentioned securities, on or before September 25, 1907.

Now the condition of this obligation is such that if the said Garrett B. Linderman, his heirs, executors, and administrators shall and do return to the said George Baglin his executors, administrators and assigns, the said above mentioned securities, on or before said 25th day of September 1907, then this obligation shall be void; otherwise to remain in full force and effect.

SOUTHERN SURETY COMPANY, [SEAL.]
By LE ROY MARK, *Attorney-in-Fact.*

In the presence of

H. G. JEFFERIS.
WILLIS B. PARKER.

That said bond is the bona fide act and deed of the said Southern Surety Company. In consideration of the delivery to me of said bond and upon the faith and strength thereof, I loaned to one Garrett B. Linderman, being the Garrett B. Linderman mentioned in said bond, United States Government Bonds known as "Old 4's," of the par value of forty-five thousand dollars ($45,000), redeemable after July 1st, 1907, upon condition that the said Linderman would return to me the said securities on or before September 25, 1907, and the said Southern Surety Company was duly notified of the acceptance of said bond and of the loan made by me to the said Linderman upon the faith and strength thereof. The said Linderman did not return said United States Government Bonds on or before September 25, 1907, nor has he as yet returned said Government Bonds, or any part thereof, although I have frequently requested him so to do. Said bonds are of the present market value of forty-five thousand dollars (45,000).

That upon the said Linderman refusing to return said Government Bonds upon the date when, by the terms of said bond, they should have been returned, I immediately notified the said
7 Southern Surety Company of the default on the part of said Linderman and demanded payment from them of the sum of forty-five thousand dollars ($45,000), being the amount mentioned in said bond, but so far the said Southern Surety Company has not paid said sum of forty-five thousand dollars ($45,000), nor any part thereof, but to pay the same has refused.

Wherefore by reason of the premises, there is justly due and owing to me from the Southern Surety Company the said sum of forty-five thousand dollars ($45,000), with interest at the rate of six per cent. per annum from the 25th day of September, 1907, until paid, exclusive of all set offs and just grounds of defense.

GEO. BAGLIN.

Subscribed and sworn to before me this 27th day of November, 1907.

[SEAL.] R. W. CRAWFORD,
Notary Public, New York County.

8 *Pleas.*

Filed January 15, 1908.

* * * * * * *

1. Now comes the defendant, Southern Surety Company, and says that it did not undertake or promise in the manner and form, as in the first count of the declaration alleged.

2. For further plea to the said first count of said declaration, this defendant says that it is not indebted in the manner and form, as in said first count of said declaration alleged.

3. For further plea to said first count of said declaration, this defendant says that by the terms of the said writing obligatory referred to in said first count of the declaration, and of which oyer is now craved, and a true copy of which writing obligatory is now set out herewith, there is the condition following:

"Whereas: the said George Baglin has loaned or is about to loan to Garrett B. Linderman, of South Bethlehem, Pennsylvania, United States Government bonds known as "Old 4's", of the par value of forty-five thousand dollars ($45,000), redeemable after July 1, 1907,

and

9 Whereas the said Linderman has promised that he will return to the said Baglin the aforementioned securities, on or before September 25, 1907."

This defendant says that the express condition of the writing obligatory heretofore set out, upon which condition the liability of this defendant is dependent, never occurred: that the said George Baglin never loaned to the said Garrett B. Linderman the Government bonds known as "Old 4's", of the par value of Forty-five Thousand Dollars ($45,000), redeemable after July 1, 1907, either before the date of the writing obligatory sued upon, or since that date, or at any time; nor did anyone make such loan on his account to the said Linderman or to anyone for him or on his account; that the loan of the said securities, as aforesaid, was a condition precedent to the liability of this defendant upon said writing obligatory; that said condition precedent never attached, and said securities were never delivered to the said Linderman, as provided for in said writing obligatory.

4. Now comes the defendant, Southern Surety Company, and for plea to the second count of the declaration filed herein, says that the writing obligatory is not its writing obligatory in manner and form as in the second count of said declaration alleged.

5. And for further plea to the said second count of said

10 declaration, defendant says that it is not indebted in the manner and form as in said second count of said declaration alleged.

6. And for further plea to said second count of said declaration, defendant says that the writing obligatory as set out in said second count is not a full and true copy of the original of said writing obligatory, oyer of which is now craved, and set forth herewith; that there is the condition in said writing obligatory, following:

"Whereas: the said George Baglin has loaned or is about to loan to Garrett B. Linderman, of South Bethlehem, Pennsylvania, United States Government bonds known as "Old 4's," of the par value of forty-five thousand dollars ($45,000.), redeemable after July 1, 1907, and

Whereas the said Linderman has promised that he will return to the said Baglin the aforementioned securities, on or before September 25, 1907."

This defendant says that the express condition of the writing obligatory heretofore set out, upon which condition the liability of this defendant is dependent, never occurred: that the said George Baglin never loaned to the said Garrett B. Linderman the Government bonds known as "Old 4's," of the par value of Forty-five Thousand Dollars ($45,000.), redeemable after July 1, 1907, either before the date of the writing obligatory sued upon, or since that date, or at any time; nor did anyone make such loan on his account to the said Linderman or to anyone for him or on his
11 account; that the loan of the said securities, as aforesaid, was a condition precedent to the liability of this defendant upon said writing obligatory; that said condition precedent never attached, and said securities were never delivered to the said Linderman, as provided for in said writing obligatory.

7. And for further plea to the said second count of said declaration filed herein, defendant says the plaintiff herein falsely, fraudulently, and with intention to defraud the defendant conspired with the said Garrett B. Linderman to procure, and did so procure, the alleged writing obligatory from the defendant, under the express representations that the said Baglin had loaned or was about to loan United States Government bonds known as "Old 4's," of the par value of Forty-five Thousand Dollars ($45,000.), redeemable after July 1, 1907, whereas in truth and fact the said Baglin and Linderman had between themselves a secret agreement, unknown to this defendant, by which it was expressly agreed by and between said Baglin and Linderman, that the said Baglin should not transfer, deliver or loan to the said Linderman the said securities, or any securities whatsoever, which said agreement was made with the express purpose to defraud, and did defraud this defendant.

8. And for further plea to the second count of the declaration filed herein, defendant says that the plaintiff and the said Linderman, were to procure their joint note for Two Hundred Thousand Dollars ($200,000.), to be discounted by the Metropolitan Trust Company, which said note was payable on to wit: September
12 26, 1907, and out of the proceeds of the discount of said note, the said Baglin was to purchase Seventy-five Thousand Dollars ($75,000.) of United States Government bonds known as "Old 4's," redeemable on and after July 1, 1907, which said bonds,

the said Baglin under the terms of the said agreement was to loan to the said Linderman—That the writing obligatory sued upon was issued upon the understanding contained in the aforesaid agreement between the said Baglin and Linderman—That the said agreement was never carried out by the said parties and in truth and in fact, the said Baglin on purchasing the said Government bonds as aforesaid, never turned them over to the said Linderman, but the said Baglin sold the same within a very short space of time, to wit the space of six hours, and appropriated the funds derived from the sale thereof to his own use, in a wilful attempt to defraud this defendant, whereby this defendant was so defrauded.

9. And for further plea to the second count of the declaration filed herein, defendant says that it never received notice of the alleged default of the said Linderman to return the securities, as alleged in said second count of said declaration.

[SEAL.] SOUTHERN SURETY COMPANY,
By S. P. ANCKER,
Secretary & Treasurer.

STUART McNAMARA,
REGINALD S. HUIDEKOPER,
Attorneys for Defendant.

13 STATE OF TEXAS,
County of ——, To wit:

I, S. P. Ancker, being first duly sworn on oath, say that I am Secretary and Treasurer of the Southern Surety Company, Corporation, the party named defendant in the above entitled cause; that I have read over the foregoing pleas of the said defendant Company, and know that the matters and facts therein set out under my personal knowledge are true, and those set out upon information and belief I believe to be true.

[SEAL.] S. P. ANCKER.

Subscribed and sworn to before me this 10th day of January, 1908.

[SEAL.] WINNIE CASE.

* * * * * * *

Affidavit of Defense.

CITY OF DENISON,
State of Texas, ss:

I, S. P. Ancker, being first duly sworn, do on oath depose and say that I am the Secretary and Treasurer of the Southern Surety Company, which Company is incorporated under the laws of Oklahoma, and has its general offices in the City of Denison, State of Texas, and which Company is named as defendant in the above entitled cause; that, as Secretary and Treasurer of the said Southern Surety Company, I am familiar with the affairs and transactions of the
14 said Company and affiant is its agent for the purpose of making this affidavit of defence, and that the said Southern

Surety Company has a full, just and complete defense to the whole of the plaintiff's claim, as set out in the declaration filed herein, which defense is of the following nature and character: this affiant, as Secretary and Treasurer of the Southern Surety Company, is informed, believes, and the said Surety Company expects to be able to prove upon trial of this case, that the statement in the plaintiff's affidavit of merit, annexed to the declaration filed herein, that the plaintiff loaned to Garrett B. Linderman, United States Government bonds known as "Old 4's," of the par value of $45,000, redeemable after July 1, 1907, upon condition that the said Linderman would return to the said plaintiff the said securities on or before the 25th day of September, 1907, is absolutely false and untrue. On the contrary, the affiant avers on behalf of the Southern Surety Company, that the plaintiff did not, nor did anyone on his account, on or prior to the 10th day of July, 1907, or at any time, loan to the said Garrett B. Linderman, or to anyone for him or on his account, the said United States Government bonds or other securities whatsoever. And this affiant further says, that as Secretary and Treasurer of the said Southern Surety Company, that it never received notice of the acceptance of the said bond, and of the loan alleged to have—made on faith of it by reason of the failure of the plaintiff to loan to the said Garrett B. Linderman, or to anyone for him or on his account, the said bonds or any of them, the said

Garrett B. Linderman never became liable to return such
15 securities to the plaintiff, and there was no default in fulfilling the condition of bond sued upon, and no liability of the said Southern Surety Company thereon.

This affiant further says, as Secretary and Treasurer of the Southern Surety Company, which said Company is named as defendant herein, that the plaintiff herein never loaned. nor at any time tendered to the aforesaid Garrett B. Linderman the Government bonds, as set out in the affidavit of merit filed herein, and as more fully set out and denied heretofore in this affidavit, and that it never received notice of the acceptance of the bond, nor of the alleged loan said to have been made on strength of it, and by reason whereof this affiant says that the condition precedent, which should render the Southern Surety Company liable on the writing obligatory sued upon, never accrued, by reason whereof this defendant never became liable to the plaintiff herein under the terms of said writing obligatory. All of the said facts this affiant verily believes and avers that the said Southern Surety Company will be able to prove at trial. Wherefore this affiant *said* that the said Southern Surety Company has a full, just and complete defense to the cause of action set out in the declaration and affidavit of merit filed herein. And this affiant says, that the Southern Surety Company is not indebted to the said George Baglin in the sum of Forty-five Thousand Dollars ($45,000.) with interest at the rate of six per cent per annum, from the 25th day of September, 1907, exclusive of all set offs and just grounds of defense, nor in any amount whatever, but that the said Southern Surety Company has a full, just and complete
16 defense to the cause of action set out in the declaration filed herein, and further affiant saith not.

[SEAL.] S. P. ANCKER.

Subscribed and sworn to before me this 10th day of January, 1908.

[SEAL.] WINNIE CASE.

Replication to Fourth Plea.

Filed February 8, 1908.

* * * * * * *

The plaintiff joins issue on defendant's fourth plea.

BLAIR AND THOM,
Attorneys for Plaintiff.

17 *Demurrer to Defendant's Pleas.*

Filed Feb. 8, 1908.

* * * * * * *

The plaintiff says that the first, second, third, fifth, sixth, seventh, eighth and ninth pleas are bad in substance.

BLAIR AND THOM,
Attorneys for Plaintiff.

The matters of law intended to be raised on the argument of the foregoing demurrer are as follows:

First. That the first plea is improper, not being adapted to the cause of action set out in the first count of the declaration.

Second. That the second plea is improper, not being adapted to the cause of action set out in the first count of the declaration.

Third. That the third plea purports to set out a condition attached to said bond and base a defense thereon, whereas no condition is set out in said plea and it does not appear, either from the first count in the declaration or from the third plea, that there is any condition to said bond, and further, said plea attempts to deny certain recitals in said bond, which the defendant is estopped from doing.

18 Fourth. That the fifth plea is improper, not being adapted to the cause of action set out in the second count of the declaration.

Fifth. That the defendant, by its sixth plea, denies certain recitals in the bond, which it is estopped from doing.

Sixth. That the seventh plea attempts to avoid the bond by reason of fraud not relating to the actual execution of the bond. Fraud of the character set out in said plea, cannot be pleaded in an action at law by way of defense to a suit on the bond.

Seventh. That the eighth plea attempts to avoid the bond by reason of fraud not relating to the actual execution of the bond. Fraud of the character set out in said plea, cannot be pleaded in an action at law by way of defense to a suit on the bond.

Eighth. The issue raised by the ninth plea is immaterial.

BALIR AND THOM,
Attorneys for Plaintiff.

Supreme Court of the District of Columbia.

MONDAY, *February* 24, 1908.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

Upon consideration of the plaintiff's demurrer to the defendant's pleas, it is ordered that said demurrer be, and hereby is overruled as to pleas Nos. 3, 6, 7 and 8, and sustained as to pleas Nos. 1, 2, & 9. The defendant by leave of Court withdraws its plea No. 5.

19 *Replications.*

Filed March 23, 1908.

* * * * * * *

The plaintiff joins issue upon the defendant's first, second, third, fifth, sixth, seventh, eighth and ninth pleas.

BLAIR AND THOM,
Attorneys for Plaintiff.

Amended Pleas.

Filed June 17, 1909.

* * * * * * *

The defendant, the Southern Surety Company, by leave of the court first had and obtained, amends its pleas in the above entitled cause heretofore filed by substituting for the first, second, fifth and ninth pleas, respectively, the following:

1. Now comes the defendant, the Southern Surety Company, and says that the writing obligatory as set out in the first count of the plaintiff's declaration is not its writing obligatory, in manner and form as in the said first count alleged.

2. For further plea to the said first count of the plaintiff's declaration, the defendant says that the writing obligatory referred
20 to in the first count, and of which oyer is now craved, and of which a true copy is now set out herewith, sets forth as follows:

"Whereas the said George Baglin has loaned, or is about to loan, to Garrett B. Linderman, of South Bethlehem, Pennsylvania, United States Government bonds known as 'Old 4's,' of the par value of Forty-five thousand Dollars ($45,000.00), redeemable after July 1, 1897, and

"Whereas the said Linderman has promised that he will return to the said Baglin the aforementioned securities on or before September 25, 1907," and the said bond is thereupon conditioned for the return of the said securities on or before the 25th day of September, 1907.

The said condition was made upon the express agreement between the said Baglin and the said Linderman, and was so represented to this defendant before the execution of the said writing obligatory, upon the faith of which representation this defendant executed the same, that the said Baglin would loan to the said Linderman the aforesaid Government bonds, to be so as aforesaid by him returned to the plaintiff; that, after the making of the said agreement with the said Linderman that the latter should return to the said plaintiff the said bonds known as "Old 4's," so to be loaned by him to the plaintiff, and after the making of the bond sued upon in the said count of the said declaration to guaranty the fulfillment of the said agreement, the said plaintiff, without the consent or knowledge of the defendant, altered, varied, changed and abandoned the said
21 agreement between himself and the said Linderman for the performance of which this defendant's bond was executed as aforesaid, and in respect to which this defendant was surety, and thereafter entered into a separate, new, distinct and collateral agreement with the said Linderman that the plaintiff would not expect nor require said Linderman to return the said bonds to the plaintiff, and the said Linderman thereupon, in the presence of the plaintiff, without objection upon his part, and with his knowledge and consent but without either the consent or knowledge of the defendant, made sale of the said "Old 4's" Government bonds, converted them into money, and forever disabled himself from returning them to the plaintiff, and thereby, in the presence of and without objection upon the part of the plaintiff, and with his knowledge and consent, but without the consent or knowledge of the defendant, altered and abandoned the said original agreement with respect to which the defendant was surety, by reason whereof this defendant says that it has been released from the effect and operation of its said writing obligatory, and its obligation to the plaintiff as surety thereby became extinguished, and it now pleads the said alteration and abandonment with the knowledge and consent of the plaintiff in bar of the action herein.

5. For further plea to the second count of the said declaration, this defendant says the plaintiff ought not to maintain his action against this defendant because, in the terms of the said writing obligatory sued upon in said second count, of which oyer is
22 now craved, and a true copy of which is now set forth, there is contained the following:

"Whereas the said George Baglin has loaned, or is about to loan, to Garrett B. Linderman, of South Bethlehem, Pennsylvania, United States Government bonds known as 'Old 4's,' of the par value of Forty-five thousand Dollars ($45,000.00) redeemable after July 1, 1897, and

"Whereas the said Linderman has promised that he will return to the said Baglin the aforementioned securities on or before September 25, 1907"; and, the said bond was thereupon conditioned for the return of the said securities by the said Linderman to the said plaintiff on or before September 25, 1907; that the said condition was made upon an express agreement between the said Baglin and

the said Linderman, which condition was so represented to this defendant before the execution of its writing obligatory, upon the faith of which this defendant executed the same, that the said Baglin would loan to the said Linderman the aforesaid Government bonds, and that the latter would return the same to him on or before September 25, 1907; that, after the making of the said agreement between the said Linderman and the said plaintiff, and after the making of the bond sued upon herein to guaranty the fulfillment thereof, the said plaintiff and the said Linderman, without the knowledge or consent of this defendant, altered, varied, changed and abandoned the said agreement, for the fulfillment of which their said bond was executed, as aforesaid, and altered the said obligation or contract with respect to which this defendant was surety, and thereafter entered into a new, separate, distinct and collateral agreement with the said Linderman, to the effect that the plaintiff would not expect or require the said Linderman to make the return of the said bonds, known as "Old 4's," but only their equivalent in money, and the said Linderman thereupon, in the presence of the plaintiff, without objection by him, and with his knowledge, concurrence and consent, but without the consent or knowledge of this defendant, sold the said bonds on, to wit, the —— day of ——, 1907, for money, and forever disabled himself to make return thereof in accordance with his said original agreement, and with the condition of this defendant's writing obligatory sued upon in this cause, with the knowledge and consent of the plaintiff, and without the consent or knowledge of this defendant as aforesaid, by reason whereof this defendant says it has been released from the obligation of its said bond, and its liability thereunder to the plaintiff as surety has been extinguished, and now pleads the said alteration and abandonment of the said agreement by the said Linderman and the plaintiff in bar of the action herein.

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9. For further plea to the plaintiff's declaration the defendant says that, by the terms of the original writing obligatory sued upon, of which oyer is craved and of which a true copy is set out herewith, it was represented to the defendant, with the plaintiff's knowledge, that said plaintiff had loaned or was about to loan to the said Garrett B. Linderman United States Government bonds known as "Old 4's," of the par value of Forty-five thousand Dollars ($45,000.00) redeemable after July 1, 1907; that the said Linderman had promised to return the said bonds to the said Baglin on or before the 25th day of September, 1907; that, at the time of the execution of the said writing obligatory, the said Baglin neither owned nor intended to own any United States Government bonds known as "Old 4's," for the purpose of being loaned to the said Linderman or otherwise; that the said Linderman was then indebted to the said Baglin in a large sum of money, to wit, in the sum of $15,000.00, and was desirous of securing other large sums of money for his own use and benefit, and that, for the purpose of procuring money with which to pay the said indebtedness from Linderman to the plaintiff, and to secure further moneys for the use of the said Linderman, the plaintiff and the said Linderman entered into a

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conspiracy that the said representation of a loan of the said Government bonds known as "Old 4's" by the plaintiff to Linderman, to be returned to the said plaintiff on or before the 25th day of September, 1907, should be made to this defendant, and that it should thereby be induced to become surety for such return, and to execute the writing obligatory sued upon in this action; that, after this defendant had been induced by the said representation to execute its said writing obligatory, and in further pursuance of their said conspiracy to raise money at the risk and cost of this defendant, the said plaintiff and the said Linderman purchased certain Government "Old 4's" bonds and simultaneously sold them, the purchase being made with funds borrowed upon the security of the promissory note of Linderman, endorsed by Baglin and secured by cer-
25 tain collaterals provided by the latter, while the proceeds of their sale was applied to the payment of the pre-existing debt of the said Linderman to the plaintiff of $15,000.00 before referred to, and the residue *there* thereof to the uses of the said Linderman, thereby attempting in fact to render this defendant liable upon its said writing obligatory for payment of the said promissory note of Linderman to plaintiff, to the exoneration of the collateral securities furnished by the latter to secure the said note; by reason of which facts and circumstances the defendant says that plaintiff has not since the time of the making of the said writing obligatory and the condition thereof hitherto, been in any manner damnified by reason of any matter, cause or thing in said condition of the said writing obligatory contained, nor did any liability upon its part or under said writing obligatory ever accrue, and it now pleads the same in bar of the action herein.

10. And by leave of the court first had and obtained, the defendant, for further plea to the said first count of the plaintiff's declaration, the defendant says that the writing obligatory referred to in the first count, and of which oyer is now craved, and of which a true copy is now set out herewith, sets forth as follows:

"Whereas the said George Baglin had loaned, or is about to loan, to Garrett B. Linderman, of South Bethlehem, Pennsylvania, United States Government bonds known as "Old 4's," of the par value of Forty-five thousand Dollars ($45,000.00), redeemable after July 1, 1897, and
26 "Whereas the said Linderman has promised that he will return to the said Baglin the aforementioned securities on or before September 25, 1907," and the said bond is thereupon conditioned for the return of the said securities on or before the 25th day of September, 1907.

The said condition was made upon the express agreement between the said Baglin and the said Linderman, and was so represented to this defendant before the execution of the said writing obligatory, upon the faith of which representation this defendant executed the same, that the said Baglin would loan to the said Linderman the aforesaid Government bonds, to be so as aforesaid by him returned to the plaintiff; that, after the making of the said agreement with the said Linderman that the latter should return to the said plaintiff the

said bonds known as "Old 4's," so to be loaned by him to the plaintiff, and after the making of the bond sued upon the said count of the said declaration to guaranty the fulfillment of the said agreement, the said plaintiff, without the consent or knowledge of the defendant, altered, varied, changed and abandoned the said agreement between himself and the said Linderman for the performance of which this defendant's bond was executed as aforesaid, and in respect to which this defendant was surety, and thereafter entered into a separate, new, distinct and collateral agreement with the said Linderman that the loan of the said securities from the plaintiff to the said Linderman should be merely fictitious for the purpose of holding this defendant, that the said securities should never be actually loaned by said plaintiff to said Linderman, but said
27 plaintiff should go through the form and appearance of a loan of said bonds by him to the said Linderman; that in pursuance to the said collateral agreement the said plaintiff and Linderman did conspire to defraud this defendant in the following manner, that is to say, by the said Baglin fictitiously tendering the said securities to the said Linderman, not with the purpose of loaning the same to him, but with the intent and purpose of immediately withdrawing the same from the said Linderman and procuring the same to be sold and obtaining thereby from the proceeds of sale a large sum to wit: the sum of $15,000.00, which the said Linderman then owed to the said plaintiff herein, and that a bona fide loan thereof, as contemplated by the terms of said writing obligatory sued upon, should never be made, all of which facts were well known to the said plaintiff and so acted upon, by him and the said Linderman, and without the knowledge or consent of this defendant, wherefore no liability upon the part of the defendant under its said writing obligatory did ever accrue, and it now pleads the same in bar of the action herein.

[SEAL.] SOUTHERN SURETY COMPANY,
By LE ROY MARK, *Att'y in Fact.*

CITY OF WASHINGTON,
District of Columbia, ss:

I, Le Roy Mark, citizen of the United States, resident of the District of Columbia, being first duly sworn upon oath depose and say that I am Attorney-in-fact and resident agent in the District
28 of Columbia of the Southern Surety Company, a Corporation, party named as defendant in the above entitled cause; that I am the agent of the said Company for the purpose of making pleas and affidavit in support thereof to the Declaration filed herein; that I have read over the foregoing Amended Pleas of the said Southern Surety Company, to which this Affidavit is attached, and known that the matters and facts therein set out of my own personal knowledge are true, and those set out upon information and belief I believe to be true.

LE ROY MARK.

Subscribed and sworn to before me this 16 day of February, 1909.
[SEAL.] GEORGE C. SHINN,
Notary Public, D. C.

J. J. DARLINGTON,
STUART McNAMARA,
R. T. HOUGH,
Per R. S. H.,
REGINALD S. HUIDEKOPER,
Attorneys for Defendant.

* * * * * * *

Affidavit of Defense.

CITY OF WASHINGTON,
District of Columbia, ss:

I, Le Roy Mark, a citizen of the United States and resident of
29 the District of Columbia, being first duly sworn, do on oath depose and say that I am the Attorney-in-fact of the Southern Surety Company, and resident agent of said Company in the District of Columbia, which Company is incorporated under the laws of Oklahoma, and has its general offices in the City of Denison, State of Texas, and which Company is named as defendant in the above entitled cause; that, as Attorney-in-fact and resident agent in the District of Columbia of the said Southern Surety Company, I am familiar with the affairs and transactions of the said Company, and am its agent for the purpose of making this affidavit of defense, and that the said Southern Surety Company has a full, just and complete defense to the whole of the plaintiff's claim, as set out in the declaration filed herein, which defense is the following: this affiant, as Attorney-in-fact of the Southern Surety Company, is informed & believes, and the said Surety Company expects to be able to prove upon trial of this case, that the plaintiff's averment of the loan by him to Garrett B. Linderman of United States Government bonds known as "Old 4's," of the par value of $45,000.00, redeemable after July 1, 1907, upon condition that the said Linderman would return to the said plaintiff the said securities on or before the 25th day of September, 1907, is absolutely false and untrue. On the contrary, affiant avers on behalf of the Southern Surety Company that the plaintiff did not, nor did anyone on his account, on or prior to the 10th day of July, 1907, or at any time, make a bona fide loan to the said Garrett B. Linderman or to anyone for him or on his account,
of the said United States Government bonds or any other se-
30 curities whatsoever. This affiant further says that the said Southern Surety Company never received notice of the acceptance of said bond, and of the loan alleged to have been made on the faith of it, and that a bona fide loan as contemplated therein was never in fact made by the said plaintiff to the said Linderman.

This affiant further says that the plaintiff and the said Garrett B. Linderman made an express agreement, which was made known to this defendant before the execution of the writing obligatory sued upon, upon the faith of which agreement so made known to this de-

fendant, it executed the same, which agreement was that the said Baglin would loan to the said Linderman the said Government bonds, to be thereafter returned by him to the plaintiff, on or before September 25, 1907, and that after making said agreement, and after making the bond sued upon to guaranty the fulfillment of said agreement, the said plaintiff and Linderman, without the consent or knowledge of this defendant, altered, varied, changed and abandoned said agreement between himself and Linderman, for the performance of which this defendant's bond was executed as aforesaid, and in respect to which this defendant was surety, and thereafter entered into a separate, new, distinct and collateral agreement with the said Linderman that the loan of said securities from the plaintiff to the said Linderman should be merely fictitious for the purpose of holding this defendant, and that said securities should never be actually loaned by said plaintiff to the said Linderman, but that said plaintiff should go through the form and appearance of a loan of said bonds by him to the said Linderman, and that in pur-
31 suance of said new agreement the plaintiff and Linderman, without the knowledge or consent of the defendant did conspire to defraud this defendant in the following manner, that is to say, by the said Baglin fictitiously tendering the said securities to the said Linderman, not for the purpose of loaning the same to him, but with the intent and purpose which was fraudulently carried out, of immediately withdrawing the same from the said Linderman and procuring the same to be sold and obtaining thereby from the proceeds of sale a large sum of money: the sum of $15,000.00, which the said Linderman then owed to the said plaintiff herein, and that a bona fide loan, as contemplated by the terms of said writing obligatory sued upon, should never be made. By reason of said failure of the said plaintiff to make a bona fide loan of the said securities to the said Linderman or to anyone for him or on his account, the said Linderman was by the plaintiff relieved from all liability to return the said securities to the plaintiff, and no liability on the part of the defendant, the Southern Surety Company, under its writing obligatory ever accrued, owing to the failure of the plaintiff to perform in a bona fide manner the condition precedent, namely the loaning of the said securities by which the plaintiff must have performed before being able to hold this defendant upon the said bond. All of the said facts this affiant verily believes and avers that the said Southern Surety Company will be able to prove at trial. Wherefore this affiant says that the said Southern Surety Company has a full, just and complete defence to the cause of action set
32 out in the declaration and affidavit of merit filed herein.

And this affiant says, that the Southern Surety Company is not indebted to the said George Baglin in the sum of Forty-five thousand Dollars, ($45,000.00) with interest at the rate of six per cent per annum, from the 25th day of September 1907, exclusive of all set offs and just grounds of defence, nor in any amount whatever, but that the said Southern Surety Company has a full, just and complete defence to the cause of action set out in the declaration filed herein, and further affiant saith not.

LE ROY MARK.

Subscribed and sworn to before me this 16 day of February, 1909.

[SEAL.] GEORGE C. SHINN,
Notary Public, D. C.

33 *Joinder of Issue on Substituted Pleas.*

Filed February 3, 1910.

* * * * * * *

The plaintiff joins issue upon the first, second, fifth, ninth and tenth substituted pleas of the defendant, filed June 17th, 1909.

HENRY P. BLAIR,
Attorney for Plaintiff.

Additional Plea.

Filed February 9, 1910.

* * * * * * *

11. By leave of the court first had and obtained, the defendant, for further plea to the said second count of the plaintiff's declaration, says that the said plaintiff ought not to maintain his action against this defendant because in the terms of the said writing obligatory sued upon in said second count, of which oyer is now craved and the true copy of which is now set forth, there is contained the following:

"Whereas the said George Baglin has loaned, or is about to loan, to Garrett B. Linderman, of South Bethlehem, Pennsylvania, United States Government bonds known as 'Old 4's' of the par value
34 of Forty-five thousand dollars ($45,000.) redeemable after July 1, *1897*, and

"Whereas the said Linderman has promised that he will return to the said Baglin the said aforementioned securities on or before September 25, 1907"; and, the said bond was thereupon conditioned for the return of the said securities by the said Linderman to the said plaintiff on or before September 25, 1907, and the said condition was made upon the express agreement between the said Baglin and the said Linderman, and was so represented to this defendant before the execution of the said writing obligatory, upon the faith of which representation this defendant executed the same, that the said Linderman would return to the said Baglin the aforesaid Government bonds so loaned or to be loaned as aforesaid, which return was to be made by him, the said Linderman, on or before September 25, 1907; that after the making of the said agreement between the said Linderman and the said plaintiff, and after the making of the bond sued upon herein, to guarantee the fulfillment thereof, the asid plaintiff and the said Linderman, without the knowledge or consent of this defendant, altered, varied, changed and abandoned the said agreement for the fulfillment of which the bond of the defendant was executed as aforesaid, and altered said obligation or contract with respect to which this defendant was surety, and thereafter the said Linderman and the said

Baglin entered into a new, separate, distinct and collateral agreement upon valid conideration extending the time within which the said Linderman should return the aforesaid Government bonds known as
"Old 4's," and the said Baglin by the said new and collateral
35 agreement as aforesaid agreed with the said Linderman that
he, the said Linderman, should not be required to return the aforesaid Government bonds upon the 25th day of September, 1907, as was represented to this defendant before the making of the bond sued upon in said second count and in respect to which obligation or contract this defendant was surety, and by said new and supplemental agreement the said Linderman and the said Baglin contracted that the aforesaid Government bonds should be returned by him, the said Linderman, at or before a later date, to wit, on the 26th day of September, 1907, which said new, separate, distinct and collateral agreement for the extension of the time for the return of the said Government bonds was made without the consent or knowledge of this defendant, by reason whereof this defendant says that it has been released from the obligation of its said bond and its liability thereunder to the plaintiff as surety has been extinguished, and now pleads the said alteration of said agreement and the extension of the time for the return of the said Government bonds by the said Linderman to the plaintiff in bar of the action herein.

McNAMARA & HUIDEKOPER,
J. J. DARLINGTON,
Attorneys for Defendant.

DISTRICT OF COLUMBIA, *ss:*

I, C. S. Cobb, being first duly sworn, do on oath depose and
36 say that I am the President of the Southern Surety Company,
a corporation, which Company is named as defendant in the above entitled cause, that I am the agent of said Company for the purpose of making pleas and affidavits in support thereof, that I have read over the foregoing supplemental plea of the said Southern Surety Company to which this affidavit is attached and the matters and facts therein set out as of my own personal knowledge are true and those set out upon information and belief I believe to be true.

—— ——.

Subscribed and sworn to before me this — day of February, A. D. 1910.

—— ——.

Supreme Court of the District of Columbia.

THURSDAY, *February 17th,* 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

Come again the parties hereto aforesaid in manner aforesaid and the same jury that was respited yesterday, who after further hearing

the case and being given the same in charge upon their oath say they find the issues herein in favor of the plaintiff and that the money payable by said defendant to said plaintiff by reason of
37 the premises, is the sum of Forty-Five Thousand Dollars ($45,000.00) with interest thereon from the 25th day of September, 1907.

Thereupon, the defendant by its attorney waives the four days' time within which to file a motion for a new trial; whereupon judgment on said verdict is ordered to be forthwith entered.

Therefore, it is considered that the plaintiff herein recover of defendant herein the sum of Forty-five Thousand Dollars ($45,000.00) with interest thereon from the 25th day of September, 1907, being the money as aforesaid found payable by said defendant to said plaintiff by reason of the premises, together with costs of suit to be taxed by the clerk and have execution thereof.

From the foregoing judgment, the defendant herein by its attorneys of record notes an appeal to the Court of Appeals of the District of Columbia, and upon motion, the penalty of a bond for costs, is fixed in the sum of One Hundred Dollars ($100.00) or to operate as a Supersedeas in the sum of Sixty-five Thousand Dollars.

Order for Citation.

Filed March 2, 1910.

* * * * * * *

The Clerk of said Court will please issue citation in above cause for appeal to Court of Appeals.

J. J. DARLINGTON,
Attorney for Defendant.

38 In the Supreme Court of the District of Columbia.

Filed Mar. 4, 1910. J. R. Young, Clerk.

At Law. No. 50002.

GEORGE BAGLIN
vs.
SOUTHERN SURETY COMPANY, a Corporation.

The President of the United States to George Baglin, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal noted in the Supreme Court of the District of Columbia, on the 17th day of February, 1910, wherein the Southern Surety Company, a corporation, is Appellant, and you are Appellee, to show cause, if any there be, why the Judgment rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this 2nd day of Mareh, in the year of our Lord one thousand nine hundred and ten.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By ALF. G. BUHRMAN,
Ass't Cl'k.

Service of the above Citation accepted this 4th day of March, 1910.

HENRY P. BLAIR,
Attorney for Appellee.

[Endorsed:] 10. No. 50,002. Law. Equity. George Baglin vs. Southern Surety Company. Citation. ——, 19—. Accepted by pl'ff's att'y, infra. Filed Mar. 4, 1910. J. R. Young, clerk. —— ——, marshal. —— ——, attorney for appellant.

39 *Memoranda.*

March 4, 1910.—Supersedeas bond approved and filed.
March 11, 1910.—Bill of Exceptions submitted.

Supreme Court of the District of Columbia.

TUESDAY, *June* 21*st,* 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

The Court having this day signed the Bill of Exceptions heretofore submitted herein, now orders the same of record as of the time of the noting thereof at the trial. Further, upon agreement of the parties hereto by their respective attorneys of record, the time within which to file a transcript of the record herein, in the Court of Appeals of the District of Columbia, is hereby extended to and including the first day of August 1910.

40 *Bill of Exceptions.*

Filed Jun- 21, 1910.

In the Supreme Court of the District of Columbia.

No. 50002. At Law.

GEORGE BAGLIN
vs.
SOUTHERN SURETY COMPANY.

Bill of Exceptions.

Be it remembered that the above entitled cause came on for trial on the 9th day of February, 1910, before the Hon. Harry M. Cla-

baugh, Chief Justice of the Supreme Court of the District of Columbia, and a jury empanneled and sworn to try the issues between the parties, whereupon the plaintiff, called as a witness on his own behalf, to maintain the issues on his part joined, testified that in the summer of 1907 and for about eleven years prior thereto, he was in the employ of F. Agustus Heinze as his private secretary; in reference to his general affairs, but had nothing to do with the Mercantile National Bank, of which Mr. Heinze was President and in which he had his principal New York office; that he first saw the bond in suit on July 17th, 1907, at the Mercantile National Bank, when it was first shown to him and afterwards, at a later time on that day, delivered to him by Garret B. Linderman and, the execution of the said bond by the defendant and the authority for its execution thereof by Leroy Mark as its Attorney being conceded, it was offered in evidence, as follows:

41 Know all men by these presents:

That the Southern Surety Company, a corporation organized and existing under the laws of Oklahoma Territory, with its principal office and place of business in the City of Denison, State of Texas, and an office and regular place of business in the City of Washington, District of Columbia, (herein called the Company) is held and firmly bound unto George Baglin, of the City of New York, in the sum of Forty-five thousand dollars ($45,000) to be paid to the said George Baglin, his heirs and assigns, at its office in the City of New York, the payment whereof well and truly to be made and done, the said Company binds itself, its successors and assigns, firmly by these presents, sealed with its seal and dated this 10th day of July, 1907.

Whereas: The said George Baglin has loaned, or is about to loan to Garrett B. Linderman, of South Bethlehem, Pennsylvania, United States Government Bonds, known as "Old 4's" of the par value of Forty-five thousand dollars ($45,000), redeemable after July 1, 1907, and

Whereas: the said Linderman has promised that he will return to the said Baglin the aforementioned securities on or before September 25, 1907.

Now the condition of this obligation is such, That if the said Garrett B. Linderman, his heirs, executors and administrators shall and do return to the said George Baglin, his executors, administrators and assigns, the said above mentioned securities, on or before said 25th day of September, 1907, then this obligation shall be void: otherwise to remain in full force and effect.

[CORPORATE SEAL.] SOUTHERN SURETY COMPANY,
By LEROY MARK, *Attorney-in-Fact.*

In the presence of

H. G. JEFFERIS.
WILLIS W. PARKER.

42 The plaintiff thereupon further testified that on the said 17th day of July, 1907, he lent Linderman United States Government bonds known as Old 4's of the par value of $42,850, redeemable after July 1st, 1907, pursuant to the undertaking in suit and its delivery, one Williams, a friend of Linderman, being also present; that these bonds were purchased on that day and paid for by Heinze's check; that witness was acting in the various transactions at the request of Heinze; that witness had first met Williams in the latter part of June, 1907, when he was at the bank two or three weeks before the giving of the bond; that Linderman had an impediment in his speech making it very hard to understand him, and that when he came there with Williams, the latter ordinarily did most of the talking; that on July 17th, when plaintiff received the bonds, he counted them and they were then counted by Williams, in the office of the President of the Bank, after which witness delivered them to Linderman, and received the undertaking in suit; that Linderman did not take the bonds out of the bank, but said he wanted to raise money on them; that he would hypothecate them as collateral if he could get anyone to lend on them close to their par value, and, otherwise, that he would redeem them at the Treasury; that Linderman and Williams had a conversation there and they finally asked witness to introduce them to the cashier of the bank, that he did so, the cashier being in the building, probably 50 feet from witness' desk; that they then went to the cashier's desk, either Linderman or Williams taking the bonds; when Linderman and Williams told him they wished him to redeem the bonds for them, which he agreed to do on the following day, it being then too close to three o'clock for the purpose; that

43 the bonds were then delivered to the cashier, a Mr. Klein; that witness never saw them again, and does not know of his own personal knowledge but thinks they were redeemed; that Linderman, on that occasion, explained to the cashier that he desired $30,000 that afternoon, asked the cashier to give him that amount and, after cashing or redeeming the bonds, the cashier was to turn the balance over to the plaintiff to apply on a $15,000 one day note that he was holding against Linderman, payable to plaintiff's order, which was then past due and on which nothing had been paid; that the cashier gave Lind-man a cashier's check for $30,000, and that the plaintiff on the following day received something over $12,000; that on July 25th, pursuant to the undertaking and in reliance on it, he loaned $2,050.00 par value of other United States old 4's to Linderman, together with still other Government bonds loaned at the same time, but not covered by the guaranty in this suit; that the Government bonds loaned him on that date with reference to the present suit was $2,050, the transaction taking place in the Mercantile National Bank building, the bonds being counted first by the plaintiff, then by Williams for Linderman, after which they were turned over to Linderman, who, with Williams, requested Klein to redeem them at the Treasury, and to pay all the proceeds to witness in excess *if* $30,000, which $30,000 had to do with another transaction; that the excess in question was

to apply on the said $15,000 note; that plaintiff last saw these bonds when they were delivered to the cashier by Linderman, and has no personal knowledge about them subsequently; that in making these loans of bonds and in conducting the transaction about which he has testified he did so in reliance on the undertaking now in suit; that, in the second transaction the money to buy the Government bonds was also supplied by Heinze's personal check, payable
44 to the broker from whom they were purchased, and that Linderman had never returned to witness any United States Government bonds, Old 4's, and that no one had done so for him, or repaid to him in any manner the value of the said bonds or any part of them.

Thereupon, on cross examination, the plaintiff testified that he never owned any bonds; that he instructed Linderman that he should buy the bonds; that he instructed him to give the order to the broker; that he, Baglin, paid the broker, and that he did so with Heinze's money; that, on the same day, July 17, 1907, he received from Linderman the latter's check for $550 to the plaintiff's order, which the plaintiff collected, and that it was the amount of the premium on the bonds so purchased and loaned on that date over and above par; that he also received and collected from Linderman on the same day a check for $52.50 which was the accrued interest to that date on the $15,000 promissory note; that he is not sure whether the check for $550.50 did or did not include the broker's commission on the bonds, or whether he bought the bonds at a flat price; that he thinks the date of the $15,000 note was June 17th, or 19th, and that it was about a month over-due; that he took from Linderman on that day a receipt for $45,000 of bonds; that he placed the order for $45,000 of bonds, but that he was only able to purchase and deliver that day in all, $42,850.00, the receipt being probably drawn up a little in advance of getting the bonds from the broker, whereupon the following ensued:

Q. Was not this the situation with reference to these $45,000 of bonds; that it was endorsed by both you and Linderman; that the bonds were to be sold, and Linderman was to take $30,000, and you were to ge- $15,000 or your note; and that this check was to pay interest on the note; was not that the transaction? A. Yes; but it was not understood at that time that he was going to get some of the bonds later.

45 The witness further testified on cross-examination that the receipt was taken in the cashier's office just about the time of the delivery of the bonds, he thinks probably just before they were delivered; that he thinks it was prepared by Linderman's attorney, Mr. Twombly; that plaintiff's attorney, Mr. Emory, was there, but he does not think he prepared it; that the said receipt contained, also, the following: "Mr. Baglin also represents hereby to Mr. Linderman that it is his desire and intention at the time when said bonds would be returnable pursuant to the aforementioned agreement, to accept from Mr. Linderman the face value of said bonds in cash, with interest at 6%, in lieu of the return of the bonds themselves;" that this provision was put into the receipt

so that it would be optional with Linderman to return the bonds or their amount in cash, and he thinks it was put in at Linderman's request, before the bonds were sold; to the question whether it was put in before the bonds were sold, at Linderman's request, so that he might have the right to sell them if he wanted to, the witness answered, "Well, I presume it was up to him to do whatever he seen fit with the bonds." That, on July 17th, it was agreed between them that plaintiff would purchase and deliver the balance of the $45,000 of bonds, and that this was done on July 25th, at which time an additional $30,000 of the said bonds were purchased and delivered to Linderman, the order for their purchase being given through the broker of Linderman, upon delivery by him of a similar undertaking by the Title and Guaranty Company, of Scranton, Pa., for the return of the said $30,000 of the said
46 bonds, upon the delivery of which bonds plaintiff went again with Linderman and Williams to the Cashier's desk, where they requested him to redeem the said bonds for Linderman, and that the Cashier gave Linderman a cashier's check for $30,000; and that, if there was a broker's commission, it was paid to plaintiff by Linderman.

The plaintiff further testified that he had counsel in the transaction, who were employed and paid by Heinze and were acting for him, plaintiff being a nominal party; that the plaintiff and his counsel had doubtless talked about the bond before July 17th, and he knew Linderman expected to give a surety company bond; that he and Williams submitted a list of surety companies which they could give, among which was the defendant; that he did not recall whether his counsel examined the defendant's charter before July 17th; that Linderman talked about wanting some money on these bonds some time before the bond in suit was handed plaintiff; that he was coming into the bank almost daily for probably two weeks before that time and said he was endeavoring to get this surety undertaking, that he was very anxious to get the thing completed, and that he wanted to raise some money; that he thought the subject of selling the bonds was first brought up on the day of the delivery of the bonds to Linderman, so that he can't say he discussed with Williams the matter of selling the bonds before that day; that he has no doubt that he discussed with Williams the scheme of getting the bonds and selling them, because they could not get a surety company to guaranty the payment of money; that there was no doubt he discussed it with Linderman and Williams and perhaps
47 in the presence of Heinze; that he went to the office of his counsel, Messrs. Kellogg, Emory and Beckwith on one or two occasions; and thereupon the following ensued:

Q. Did you not discuss this matter of substituting an ostensible loan of bonds and a surety company bond to cover that instead of a surety company bond to guarantee the return of the money? * * * Had you not discussed that with Linderman sometime before July 17? A. I do not recall at this time.

Q. Would you say you did not? A. No, I would not swear positively that I did or did not.

The plaintiff further testified that he could not say that the proposition referred to, made on July 17th, to sell the bonds took him altogether by surprise, because he knew Linderman was getting the bonds for the purpose of raising money; that he thinks the use of the bonds as collateral was discussed several days before the 17th; that he did not know you could not borrow the face of past due Government bonds upon them as collateral, and thereupon the following ensued:

"Q. Do you know why these bonds were not used as collateral? why they were not used as collateral instead of selling them? A. Why no; I presume——

Q. Do you know? A. No, I do not know.

Q. Was it stated? A. The bonds were being redeemed at the Treasury.

Q. Was it stated why they were being redeemed instead of being used as collateral for a loan? A. No, it was not.

Q. When did you last hear any discussion about their being used as collateral before July 17th? A. I do not recall.

Q. Several days? A. Several days, probably."

The witness further testified that he introduced Linderman to the cashier at Linderman's request; that he could not say whether he was conversant at that time with what Linderman intended to do; that when he introduced him to the cashier, the plaintiff
48 did not go off about his business, but stayed there, because he had an interest in the bonds that he wished to get cleaned up; that he was holding a one day note of $15,000 of Linderman's, which he was to repay to plaintiff; that this is why he went to the cashier's office; that if Linderman had been going to hypothecate the bonds plaintiff would have wanted to follow them up until he got his money on the note; that he could not say it was discussed what Linderman wanted to do with the bonds, although plaintiff might have surmised; that the receipt stating it was plaintiff's desire and intention to be paid the par value of the bonds with interest, instead of their return, had been given before the introduction to the cashier; that he does not recall whether he has said that this language was put into the receipt because Linderman wanted it in so he would be at liberty to sell the bonds; that he cannot say that this is a fact; and to the question why, then, it was put in, he answered "Because if Linderman had hypothecated these bonds as collateral, the bonds might have been sold by the third party; therefore it was optional with Linderman as to whether he returned the bonds or cash equivalent;" that plaintiff knew interest was stopped on the bonds, that there might be no premium on them in sixty days, and that their par value with interest might be more than their market value; that he knew, when he expressed the desire and intention stated in the receipt, that he was arranging for what might be a larger pecuniary value than the bonds would be and that he did not tell the defendant anything about that arrangement; that he had no communication at all with it; that he was making this transaction in reliance on the defendant's bond, and he knew its

undertaking was for the return of bonds and not of money,
49 and that he gave no notice to the defendant at any time; that before sale or delivery of the bonds, he made the agreement of July 17, that he desired return of the money with interest instead of the bonds, although he knew the defendant's undertaking was for the return of the bonds, and that he did this without notifying the defendant; that Linderman wanted $30,000 paid to himself and all over and above the $30,000 paid to plaintiff, which was $12,000; that plaintiff had agreed to furnish $45,000, and the reason of its being $30,000 to Linderman and $15,000 to plaintiff was so that plaintiff's $15,000 note could be paid simultaneously with the transaction.

Thereupon, subject to exception on behalf of plaintiff, and subject, further, to a motion to strike out the testimony later, the following instruments were offered in evidence:

"George Baglin and Garrett B. Linderman, both of New York, hereby agree as follows:

I. Mr. Linderman requests Mr. Baglin to cause to be deposited with the Metropolitan Trust Company, of New York, sixty-
50 seven hundred (6700) shares of United Copper Common Stock as collateral for the joint note of the parties hereto of Two hundred thousand ($200,000.) Dollars about to be discounted with said Trust Company, payable September 26th, 1907.

II. Mr. Linderman also requests Mr. Baglin to procure for him out of the proceeds of this loan Seventy-five thousand ($75,000) Dollars and Mr. Linderman agrees to repay the said sum to Mr. Baglin on September 26th, 1907, with interest at six (6%) per cent.

III. In further consideration of the foregoing, Mr. Linderman agrees that he will on or before June 27th furnish to Mr. Baglin a bond in form satisfactory to Mr. Baglin, executed by the Peoples Surety Company, guaranteeing the re-payment to Mr. Baglin of the said Seventy-five thousand ($75,000.) Dollars with interest, at the said date, and of any part thereof which Mr. Linderman may receive.

IV. In consideration of the foregoing, Mr. Baglin agrees that he will forthwith loan to Mr. Linderman out of the proceeds of the loan from the Trust Company, when made, the sum of Fifteen thousand ($15,000) Dollars upon Mr. Linderman's one day note, and that he will, as soon as the foregoing bond is furnished, loan him the additional sum of Sixty thousand ($60,000) Dollars. Upon giving said bond the one day note shall be canceled and the entire Seventy-five thousand ($75,000.) Dollars shall be re-payable to Mr. Baglin on September 26th, 1907, with interest at six (6%) per cent.

Dated, June 19th, 1907.

GARRETT B. LINDERMAN.
GEO. BAGLIN."

51 "Whereas George Baglin and Garrett B. Linderman both of the City of New York entered into a certain agreement in writing, dated on or about the 19th day of June, 1907; and

Whereas the acts referred to in Paragraph 1 of the afore-mentioned agreement have already been performed and the loan of $15,000 referred to in Paragraph IV thereof has been made, and the one day note therein referred to has been given; and

Whereas said parties now desire to modify and supplement the same as to the acts still to be done thereunder in certain respects.

Now, Therefore in consideration of One dollar by each to the other in hand paid, and the mutual promises and covenants herein it is agreed between said parties as follows:

I. That paragraph II of the afore-mentioned agreement be modified so that Mr. Baglin instead of loaning Seventy-five Thousand ($75,000) Dollars cash to Mr. Linderman, shall invest said sum in United States Government bonds known as 'Old 4's,' redeemable on and after July 1st, 1907, by purchasing with said sum seventy-five (75) of such bonds of the par value of One Thousand ($1,000) Dollars each upon being supplied in cash by Mr. Linderman with the excess over Seventy-five Thousand ($75,000) Dollars necessary for the purchase of said bonds and the payment of commission upon such purchase.

II. Said paragraph II of the afore-mentioned agreement is hereby further supplemented by providing that Mr. Baglin shall forthwith loan to Mr. Linderman said Seventy-five Thousand ($75,000) Dollars' worth of bonds upon the repayment, as provided in Paragraph IV hereof of the Fifteen Thousand ($15,000) Dollars previously advanced by Mr. Baglin to Mr. Linderman; and Mr. Linderman hereby agrees on September 26th, 1907, to return to Mr. Baglin said United States Government bonds or others of the description and

52 par value above referred to.

III. Paragraph III of the former agreement above referred to is hereby modified so that Mr. Linderman shall furnish contemporaneously herewith a bond or bonds in form satisfactory to Mr. Baglin and executed by a surety company or surety companies satisfactory to him conditioned for the return on September 26th, 1907, of the United States Government bonds of the description and par value above referred to.

IV. It is hereby mutually agreed that contemporaneously with the execution hereof Mr. Linderman shall return to Mr. Baglin the Fifteen Thousand ($15,000) Dollars heretofore loaned to Mr. Linderman by Mr. Baglin pursuant to Paragraph IV of the afore-mentioned agreement, with interest to date, whereupon Mr. Baglin will cancel and surrender to Mr. Linderman the latter's promissory note referred to in said paragraph.

V. It is hereby mutually agreed that in case a renewal or extension of the loan of Two Hundred Thousand ($200,000) Dollars from the Metropolitan Trust Company referred to in Paragraph I of the aforementioned agreement shall be obtained, then the obligation of Mr. Linderman hereunder to return said bonds, as heretofore set forth, shall be likewise extended for the same period, Provided

however, and only upon the express condition that Mr. Linderman shall furnish to Mr. Baglin the consent of the surety company or surety companies executing undertakings for the return of said government bonds, as heretofore provided, in writing in a form satisfactory to Mr. Baglin to the extension of Mr. Linderman's time to return the said bonds, and shall agree in such written consent that such extension shall in no wise impair, limit or affect the liability of such company or companies upon such undertakings.

Witness the hands and seals of the parties hereto this 17th day of July, 1907.

GEO. BAGLIN. [SEAL.]
GARRET B. LINDERMAN. [SEAL.]

In the presence of:
—— ——."

53 "The receipt by Mr. Garrett B. Linderman from Mr. George Baglin of $45,000 par value of United States Government Bonds, known as old Fours, pursuant to the agreement between the above mentioned parties of June 19th, 1907, as supplemented and modified by the further agreements between the same parties dated July 17th, is hereby acknowledged and the receipt by Mr. Baglin from Mr. Linderman of an undertaking of the Southern Surety Company for the return of said bonds pursuant to the aforementioned agreements is likewise acknowledged.

Mr. Baglin agrees that the remaining $30,000 par value of bonds of the said description which he has agreed to loan pursuant to the aforementioned agreements, will be procured and loaned by him to Mr. Linderman when Mr. Linderman provides a further undertaking from a satisfactory Surety Company for the return of said additional $30,000 of said bonds as provided in the agreement aforementioned.

Mr. Baglin also represents hereby to Mr. Linderman that it is his desire and intention at the time when said bonds would be returnable pursuant to the aforementioned agreements to accept from Mr. Linderman the face value of said bonds in cash with interest at (6%) Six per cent in lieu of the return of the bonds themselves.

Dated July 17th, 1907.

GARRETT B. LINDERMAN.
GEO. BAGLIN."

Plaintiff further testified on his cross examination that it was Linderman or Williams, he could not recall which, who explained to Klein that $30,000 was wanted by Linderman and that
54 plaintiff was to get the other $15,000; that he knew that, under the agreement he, plaintiff, signed before they went to the cashier, $30,000 was to be Linderman's share of that transaction and that plaintiff was to get the other $15,000; that, when he delivered these bonds to Linderman, the return of other bonds or cash in September would have been satisfactory, but that he really expected to have cash; that he knew the obligation in suit was simply for the return of these Government bonds; that he considered the bonds equivalent to cash, and did not expect to get the bonds

back when he delivered them—that the bonds were equivalent to money; that the statement that he loaned the bonds in reliance on the obligation in suit, expecting to hold the surety company for the money, although its undertaking was to have the bonds returned to plaintiff, he thought was about correct, and that he did not notify the surety company he expected the money instead of the bonds; that, when he loaned the further bonds, on July 25th, he thinks he knew beforehand that they expected to sell them; that witness ordered these bonds through either the broker or Linderman, he can't recall which, but that he has a distinct recollection that he ordered them himself from the broker; and that the broker was Levinson & Co.; to the question why he ordered the bonds to be purchased, knowing they were going to be sold again, instead of lending the man the money and being done with it, he answered, "I agreed to loan him bonds;" and to the question why, instead of pursuing the round-about, circuitous process of giving an order to the broker to buy bonds, delivering them to Linderman meaning he was going to sell them, taking them to the cashier and having them sold, and then getting the money for the same amount he had paid for the bonds, he did not lend the money to Linderman, he answered, "He
55 could not get an undertaking for the return in cash"; that he did not know why he could not get it; that he testified in Philadelphia that he, Linderman, Williams and Heinze discussed the matter over and over again before the transaction, and it was plaintiff's understanding that no surety company would give a bond if it knew it was going to be held for the payment of money absolutely.

The witness further testified as follows:

Q. What reason was there, Mr. Baglin, for getting a bond in that shape, that you know of, when the guarantee company would not give one to pay money absolutely? A. Because we would not loan either cash or bonds without having some security for the undertaking.

Q. Was the object of this round-about process designed to get a surety company to give a bond that could be converted into an obligation to pay money without its knowing it? A. No; I cannot say it was.

Q. Then what other object was there? A. The object was solely that we would be secured.

Q. What reason was there for doing this thing or to get that kind of a bond? A. Because they could not get a bond any other way.

Q. Why could they get a bond in this way? A. Why could they?

Q. Yes; if as you say you understood the bond would make them liable for money anyhow? A. Yes sir; the bond would be liable for the government bonds.

Q. For the cash, you say, as you understand it? A. That was the agreement.

56 Q. Whose agreement? A. Between Linderman and myself.

Q. And you say that when you took this undertaking for the re-

turn of these bonds you considered that was making them liable for the cash that the bonds were worth? A. Yes sir.

Q. And you knew he would not give a bond knowingly for the return of cash? A. He could not do so.

Q. You knew the surety company would not knowingly give a bond for the payment of cash? A. I know he said he could not do so.

Q. He could not get that kind of a bond? A. Yes sir.

Q. My question was what other reason was there for taking this process except to get a bond from a company which would amount to a bond to pay cash without the company knowing they were giving that kind of an obligation? A. It is practically the same thing."

The witness further stated that in the Pennsylvania trials he had testified that the original intention was that Linderman should get a trust company or a surety company bond conditioned for the return simply, of the $75,000 which was to be loaned to him under the June 19th agreement; that it was found impossible to do this, because the surety companies were legally incapacitated from making such an agreement, and that in those trials he was interrogated and answered as follows:

"Q. And then the intention here was to substitute Government bonds which you, for Mr. Heinze, were to purchase and de-
57 liver them over to Mr. Linderman, who was immediately to have them cashed to get the money. That is correct, is it not? A. It is immaterial to us what Mr. Linderman did with the bonds.

Q. I want to know the thing which was to be done. Whether it was material or immaterial somebody else than you or I will pass upon. That was the arrangement that was made. That was simply a form of purchasing Government bonds with the intention that Mr. Linderman should immediately dispose of them to get money so that he would have the money in hand as was originally intended, but it could not be carried out because of the legal incapacity of the surety companies to make such an obligation. That is correct, is it not? A. I think that is correct."

That he further testified in the Pennsylvania trials that either Linderman or Williams explained that it was impossible to get a surety company to give a bond for the return of cash; that they brought him a list of surety companies and informed him that any one of them they could get to give a bond to cover the return of United States Government bonds; that Heinze was present at some of these interviews, all of which was before July 17th; that in the Pennsylvania trials witness had testified that after both he and Williams had counted the bonds "Linderman stated that he wanted to dispose of them, and I am not sure whether I suggested or someone else suggested that the bank would cash them for him," and that, after this suggestion had been made, "we went to Mr. Klein, the cashier of the bank, and asked him if he would cash
58 them, and he stated that he would;" and that he had been interrogated and had answered as follows:

Q. In point of fact, was not the arrangement made at or before the time when the bonds were ordered to be bought, that the bonds were simply to be bought and handed over, and taken right out and sold again? Was not that the arrangement which was made? A. The arrangement that was made was that I should turn the bonds over to Linderman, then it was up to him as to what he could do with them. He could dispose of them as he saw fit."

Thereupon the plaintiff on his cross-examination further testified as follows:

"Q. Were you willing that Linderman should take those bonds away with him and do what he pleased with them? A. Yes sir, provided he paid me the $15,000.

Q. That had to be done first? A. Yes sir.

Q. How was he to do that except by selling these bonds? A. He might have had $15,000.

Q. Well, did you ask him if he had $15,000? A. I cannot say that I did.

Q. You went into the cashier's office to get the money? A. Yes sir.

Q. Expecting to get it out of the sale of these bonds? A. I did."

The witness further testified as follows:

"Q. Then you did understand from the beginning, after you knew he could not give a surety bond to pay money, that these bonds were to be gotten in the way described and then sold to raise
59 money? A. They were to be redeemed.

Q. And the money to be gotten in that way? A. Yes, sir."

Witness further testified, as he had testified in Philadelphia, that on several occasions prior to July 17th Linderman had stated it was impossible to get the surety company to give a bond for the return of a cash loan; and that he then testified he thought it was understood that Linderman was going to dispose of the bonds; that, according to his best recollection, Williams had made the same statement; that the instrument of June 19th and the first instrument of July 17th were prepared by his counsel and the second instrument of July 17, referred to as a receipt, he thought was prepared by Mr. Linderman's counsel; that all of them were passed upon by Mr. Heinze's counsel; that the first paper of July 17th was executed about two hours before the bonds were delivered and that the second paper of July 17th was executed in the bank, he thinks in the President's office, before they went into the cashier's office, while the undertaking in suit was in the possession of Linderman, who had shown it to the plaintiff; that no representative of the defendant was present on that occasion; that he signed the paper of July 17th, which said that Linderman was to return the Government bonds or others of like description and par value, when he knew that the defendant's undertaking had already been executed and was ready for delivery.

The plaintiff thereupon further testified as follows:

"Q. Did you at any time inform the Surety Company that one of the objects of this proceeding was to get payment of an over-
60 due obligation of Linderman's to you, which had no security? A. I had no communication at all with the surety company.

Q. That is your way of saying you did not give them that information? A. I did not.

Q. It is a fact, is it not, that it was one of your objects to get that $15,000 paid for which you had no security? A. I cannot say it was.

Q. It was not? A. No sir.

Q. Did I misunderstand you when I heard you say you would not have let Mr. Linderman take those bonds except by paying the note? A. Unless he would have paid me on account of the $15,000 note.

Q. On account of it; or all of it? A. On account of it.

Q. You would have taken part payment? A. I took $12,000 odd on July 18th.

Q. That was because you had not produced the full amount of the bonds, was it not? A. Yes sir.

Q. It was not Linderman's fault? A. No sir.

Q. And he never got the balance of the bonds that were produced for any beneficial purpose? A. Yes, he got that July 25th.

Q. They were simply turned over by you as the balance,
61 were they not? A. There were turned over to Linderman by me.

Q. Oh, I know, that round-about process. A. Yes sir.

Q. But is it not a fact that on delivery the bonds for $45,000 were simply turned into cash and paid over to you on the second day? A. The bonds were delivered by me to Linderman and by him turned into cash.

Q. And you got the cash? A. I got cash for the balance of the $15,000 note.

Q. So the undelivered bonds never went into Linderman's hands for any beneficial purpose, except to finish paying what he owed you? A. To conform with the undertaking.

Q. What undertaking? A. The bond, the surety company bond.

Q. What was to conform to that? A. We had agreed to loan $45,000 worth of bonds.

Q. You mean you went into this proceeding in order to conform technically with the requirement of the bond? A. Yes sir."

The witness further testified that, by a clerical error, he delivered $74,900 worth of bonds, or $100 short; that this was corrected by treating the note as discharged by the payment of $14,900; that the object in not taking the whole $15,000 payment in that way was that he wanted to live up to the terms of the defendant's bond, and make it technically binding upon it; that they could not simply deliver $60,000 of bonds and cancel the note, and was there-
62 upon further cross-examined as follows:

"Q. Why? A. We could not have lived up to the contract.

Q. What contract? A. We agreed to loan him $75,000.

Q. But you did not live up to it. If you took $100 of your personal note by failing to deliver bonds, why could not you have taken the whole $15,000 that way, and why did you not do it? A. I do not recall now.

Q. Was it not because you wanted to get this Surety Company's bond technically binding on them by going through this roundabout proceeding? A. I think we wanted to live up to the terms of the bond.

Q. That was the object, was it not? A. I think it was.

Q. For every practical purpose you knew, did you not, that you could just deliver $60,000 and cancel the note? A. We had to live up to the terms of the contract.

Q. Why? A. So as to conform to the Surety Company's bond.

Q. Why? A. Because we had stated that we had agreed to loan $75,000 worth of bonds.

Q. Yes, you had to do that in order to make a case against the surety company? A. Yes.

Q. That is right, is it not? A. Yes sir.

Q. But you could not only have paid your note by properly canceling it on the receipt of the bond, without buying
63 and selling any bonds, but you could have loaned the $60,000 on them to Mr. Linderman and saved the brokers' commissions and premiums and all that, could you not? A. No sir.

Q. Why? A. For the reason the brokers' commissions and premiums were not stood by us.

Q. You could have saved that to Linderman; he could have been saved that? A. It could have been saved by Linderman?

Q. Yes. It was an unnecessary expense except for the purpose of making a technical case against the surety company? A. Exactly."

The plaintiff further testified that in addition to Linderman's check to plaintiff of $552.50 of July 17th, a premium of $650.12 was paid by Linderman for the bonds delivered on July 25th; and that one Simons was a friend of Linderman, whom he had doubt-
64 less instructed to place the order for the purchase of the bonds.

The witness further testified that Linderman conducted the negotiation with the Metropolitan Trust Company for the $200,000 discount, and subject to the plaintiff's said objection and motion to strike out later, that his reason for doing so was that, if successful, Heinze would put up the collateral and lend him $75,000; that Linderman had been brought to the bank and introduced to Heinze by Williams, and thereupon the following ensued:

"Q. Was not this the arrangement between them; in consideration of Linderman's negotiating this loan, Heinze's name not appearing in it, and Heinze getting five-eighths of the amount discounted, Heinze would loan Linderman $75,000 if Linderman secured him by a surety company bond? A. I think that is correct.

Q. And all subsequent transactions were simply trying to carry out in good faith between Heinze and Linderman this transaction? A. Yes sir.

Q. And to get to Linderman the $75,000 he wanted? A. That is correct.

Q. And to get to Heinze through you, the security of the surety company? A. Yes sir.

Q. And to put that in such form that the surety company would give the security, without knowing it was liable for the
65 money? A. That is correct."

The witness further testified as follows:

Q. You had not given any order to buy any bonds at the time you got this surety bond? A. No.

Q. Why then was this bond made to say that you had loaned him or were about to loan him, bonds? A. Because I had previously agreed to loan him bonds.

Q. I believe you told us on yesterday that you knew that the surety company would not give a bond, if it knew the transaction was one that would make it liable for the payment of money? A. I was so informed by Mr. Linderman.

Q. How did you expect Linderman to get this bond? A. I didn't have any idea how he would get it. I don't know today how he got it.

Q. You knew that he would not tell them the full transaction; you knew that he could not get the bond if he told them that he was going through this process to make them liable for the payment of a debt? A. I did not know it.

Q. You had been informed that the company would not give a bond for the absolute payment of money; had you not? A. Yes.

66 Q. And you knew he would have to apply for a bond and make some representation to them; did you not? A. Yes.

Q. And you did not know that he would have to make a representation that did not disclose these facts? A. I did not.

Q. I wish you would explain that so that a man like I am can understand it. You knew the company would not give a bond for the payment of money, and you knew this transaction was going to make them give a bond for the payment of money; and yet you did not know that he was not going to tell them all about it? A. I had nothing whatever to do with the surety company, in the getting of this bond.

Q. I have not asked you that. You said you knew he would have to make some kind of representation to get this bond? A. I did not. I didn't know that he had to make any kind of representation.

Q. Did you think the company would give him a bond without any application or representation? A. I don't know.

Q. If you thought the company gave a bond without representations or application, why did you think there was any difficulty about giving a bond for the payment of money?

Mr. EMERY: He did not say that——

By Mr. DARLINGTON:

Q. Do you mean to say that you don't know a man had to apply to a surety company in order to get a bond? A. I presume so.

Q. It was a pretty strong presumption, was it not? A. I didn't know positively."

67 Q. You presumed he would have to make application for it? A. I presumed so.

Q. You knew the company would not give the bond if it knew it was going to give a bond that would make it liable for the payment of a debt? Is that true? A. No; I can't say it is.

Q. Have you not told us half a dozen times that he told you that, and Williams told you that? A. Told me what?

Q. That the surety company would not give a bond for the absolute payment of money? A. For the return of money—yes.

Q. Then you did know that he could not make application to the company for a bond that would make them liable for the money, and get the bond? A. They might have changed their minds.

Q. If they had changed their minds there would not have been any need to spend $1200 for the use of these bonds; would there? A. No.

Q. Is it not a fact that you and Mr. Linderman and Mr. Heinze all talked over this whole matter, about his getting a surety company's bond, and that when he told you, or Williams told you that they could not get a bond for the company to pay money absolutely, did not you and Heinze and Williams and Linderman together talk freely over the matter of how you were going to get over that difficulty? A. I think so.

Q. How did you think you were going to get over it? A. I think it was suggested by Mr. Linderman or Williams that we could

68 get the surety company to give a bond for the return of securities.

Q. Let me read you from your testimony in the Title Guaranty Case at page 7:

"A. He stated on several occasions that it was impossible to get a surety company to give a bond for the return of a cash loan.

"Q. What else was said or done then with regard to this bond of suretyship? A. He stated that he could get a surety company to give a bond for the return of securities.

"Q. Then what did he do after that? A. We conversed freely on that matter and we found out—we told him at least if we could get a surety company to give a bond for the return of the United States Government bonds we would buy the bonds and turn them over to him."

That is correct; is it? A. That is correct.

Q. What do you mean by "We conversed freely on the matter?" A. I think Linderman, Williams and myself.

Q. And Heinze? A. And probably Heinze.

"Q. You knew it was unwilling to go on a bond to return the money, and you knew they were going to try to get a bond, and you discussed it with them and I did not suggest it shauld be told what you were aiming to do? A. I did not, no.

Q. You said in response to Mr. Emory's question a moment ago that you testified in the suit of Baglin vs. Title Guaranty and

69 Surety Company. in Pennsylvania, that the thing you did was simply a form of purchasing government bonds with the in-

tention that Linderman should immediately dispose of them
70 to get money on them, and you also testified in response to Mr. Emory's question, on that occasion in this Pennsylvania trial, that you had made no arrangement and had not come to any understanding with Linderman or Williams as to what they should do with these bonds after you turned them over to them. Which statemend is correct, or are both correct? A. I think they are both correct.

Q. You had not made any arrangements or come to any understanding with them about it; but it was simply a form of buying with the intention that they should be immediately disposed of to get money on them? A. Yes."

Thereupon, the witness having stated that he desired to correct his testimony, the following occurred:

"By the COURT:

Q. Do you want to correct your testimony? A. Yes.

Q. State to the Court and jury what you want to correct. A. I would like to state to the court and jury that I misunderstood that question, and I would like to have it read to me again, and to correct it.

By Mr. EMORY:

Q. After you had been asked other questions about the
71 transactions leading up to this surety company undertaking, Mr. Darlington asked you whether your idea was to get to Mr. Heinze, through you, the security of the surety company, and you said yes. And then he asked you: 'Q. And to put that in such form that the surety company would give the security without knowing it was liable for the money? A. That is correct.' A. I should have said it was not correct, because I didn't have any knowledge at that time that the surety company had given him their undertaking, so I presumed at that time that the surety company realized their liability.

Q. Did you ever take any steps in this matter, to have the surety company give any obligation in this matter without knowing what it was?

Mr. DARLINGTON: I object. That is not a correction of testimony.

The COURT: That is not a correction of his testimony. He has now corrected it by saying that he wants to state exactly the opposite to what he did state.

Mr. EMORY: Very good. That is all.

Cross-examination.

By Mr. DARLINGTON:

Q. Mr. Baglin, do I understand that when you got the bond the Southern Surety Company executed, you understood that they had
72 waived their objection to giving a bond for the payment of money? A. Well, I presumed that in the final settlement, it would be optional with the surety company whether they returned the bonds or an equivalent in cash.

Q. Please answer my question. Did you understand, when you accepted that bond, that the surety company had receded from its unwillingness to give a bond for the payment of money? A. I can't say that I did.

Q. You told us, when you were on the stand the other day, that you would not have paid this twelve hundred dollars for the privilege of handling these bonds—— A. I didn't pay the twelve hundred dollars.

Q. Who did. A. Mr. Linderman.

Q. If you had understood that the surety company had withdrawn its objection to giving an absolute bond, there would have been no necessity for paying out that twelve hundred dollars, to hold the bonds in your hands for thirty minutes, would there? A. As I previously stated, that additional expense was not stood by me.

Q. You knew there was some reason for it, did you not? A. Yes.

73 Q. What reason did you think there was for paying out that sum of money, if the surety company was willing to give a straight obligation to pay money? A. That was left to Mr. Linderman.

Q. What did you think about it? A. If it was satisfactory to Mr. Linderman, it was satisfactory to me.

Q. What did you understand about it at the time? A. My undertsanding was that Mr. Linderman would pay everything in excess, over par.

Q. What was your understanding about the willingness of the surety companies to give a bond to pay money absolutely, at the time you took this bond? A. I don't recall now.

Q. You didn't have any doubt about it, did you? A. Linderman told me that he couldn't get a surety company to write a bond for the return of cash.

Q. And he never told you anything different from that did he? A. No.

Q. And you never understood differently from that? A. No; only that they would write a bond for the return of securities.

Q. Just the kind of bond you knew you were getting? A. Yes.

Q. And you thought, if you sold the bonds, then it would
74 be a bond to pay money? A. I didn't sell the bonds.

Q. Then you thought if Linderman sold the bonds, you would get a kind of bond that they were not willing to give? A. Yes.

Q. And then you would have an obligation of the kind you understood they would not give? A. Yes.

Q. I want to ask you what there is about this that is hard to understand—this testimony you have stated you want to correct.

"Q. And to put that in such form that the surety company would give the security, without knowing it was liable for money."

What was there about that question you didn't understand? A. I cannot recall now.

Q. Look at page 60.

"Q. What other reason was there for taking this process, that is,

this roundabout way, except to get a bond from the company which would amount to a bond to pay cash, without the company knowing that they were giving that kind of an obligation?"

75 Your answer to that was:

"A. It was practically the same thing."

Did you misunderstand that question too? A. No, I can't say I did.

Q. Let us look at another one on page 111.

"Q. Why, then, was this bond made to say that you had loaned him or were about to loam him bonds? A. Because I had previously agreed to loan him.

"Q. I believe you told us on yesterday that you knew that the surety company would not give a bond, if it knew that the transaction was one that would make it liable for the payment of money. A. I was so informed by Mr. Linderman."

Did you understand that question? A. I think that is correct.

Q. Now let us try another one, at page 113. That is a little longer extract:

"Q. You knew the company would not give the bond, if it knew it was going to give a bond that would make it liable for the payment of a debt. Is that true? A. No, I can't say it is.

"Q. Have you not told us a half a dozen times that he told you that and Williams told you that? A. He told me what?

76 "Q. That the surety company would not give a bond for the absolute payment of money? A. For the return of money—yes.

"Q. Then you did know that he could not make application to the company for a bond that would make them liable for the money, and get the bond? A. They might have changed their minds.

"Q. If they had changed their minds, there would not have been any need to spend twelve hundred dollars for the use of these bonds; would there? A. No."

You understood all that, didn't you? A. I think so."

All the foregoing testimony in reference to an alleged effort by or between Linderman or others to obtain a surety company undertaking for the return of United States bonds, the purchase and lending of the bonds to Linderman, the sale or redemption of them by Linderman, and the application of their proceeds in part to the payment of an antecedent unsecured debt or otherwise was admitted by the court under the objection of the plaintiff, by his counsel, and subject to later application to strike out all the said testimony, on the ground that it was testimony tending to prove fraud or misrepresentations to induce the execution of the defendant's undertaking in suit, and that such defence was inadmissible in a

77 suit at law upon a sealed undertaking, and it was further stipulated between counsel for the plaintiff and defendant, and agreed by the court, that all further evidence of similar character, and all evidence which should be offered on behalf of the defendant tending to prove that it was misled into the execution of the bond by the fraud, misrepresentations or concealment of the plaintiff, or of Linderman or others, that it would not have executed

the bond except for such fraud, misrepresentations and concealment, and that the effect thereof was to subject it to a more hazardous liability than it was led to believe it was assuming in and by said undertaking, as well as all other evidence as to collateral transactions bearing only upon the aforesaid defenses, should be re-
78 garded as admitted subject to the like objection and subsequent motion to strike out.

The plaintiff further testified that on August 5, 1907, there was a separate transaction in reference to United States three per cent. bonds of which he bought $30,000, par value, and turned them over to Linderman, receiving a surety company undertaking for the return of those bonds; that there was no money which Linderman was to pay to the plaintiff out of this $30,000; that there was a written agreement by Linderman for the return of these three per cent. bonds; that plaintiff could not say that he expected to get the individual bonds back, but expected to get either bonds of the same denomination or cash; that he looked to the surety company to pay the money; that the cashier did not dispose of these bonds at all, but that plaintiff understood that they were disposed of through the broker Levinson by Linderman.

The plaintiff further testified that he recalled an interview between himself and Mr. Cobb, the president of the defendant company, and Mr. Johnston, its Vice-President, at the plaintiff's office
79 in New York City, in October, 1908; that he could not recall being asked by them whether he had to buy the bonds in order to lend them to Linderman and telling them that he did have to buy them, or being asked by them what Linderman wanted with the bonds and his telling them that he wanted them to sell and get money; that he does not think he made that statement; that he does not think they asked him if, when he loaned the bonds, he expected Linderman to sell them, and replying that he did expect this, and that what Linderman wanted was money; that he did not tell them, upon being asked why he did not lend him the money in the first place, instead of buying the bonds and selling them again, that they could not get a surety company to guaranty the return of money, but could get it to guaranty the return of bonds.

The plaintiff further testified that on September 26th, 1907, an interview took place between himself, Linderman, his counsel and Linderman's counsel, at which the following papers, all of which were prepared by plaintiff's counsel, were signed by the respective parties.

Letter of September 26 from Baglin to Linderman.

Letter of Linderman to Baglin of same date.

Letter from Baglin to Southern Surety Company of same date, all of which were admitted in evidence subject to the plaintiff's objection and right to move later to strike out, above set forth.

80 "NEW YORK, *September 26th,* 1907.

Garrett B. Linderman, Esq., New York City, N. Y.

DEAR SIR: Pursuant to certain contracts entered into between you and the undersigned, dated respectively June 19th and July 17th,

1907, there were heretofore loaned to you by the undersigned certain United States Government bonds, known as "Old 4's."

By the terms of the agreement referred to said bonds, of the aggregate par value of $75,000, were to be returned by this date.

The undersigned therefore hereby demands that the said bonds be forthwith returned to him pursuant to said agreement.

Kindly advise me definitely upon receipt of this regarding your ability to make such return at once.

Yours very truly,

GEORGE BAGLIN.

NEW YORK, *September 26th,* 1907.

1. Mr. Garrett B. Linderman hereby admits to Mr. George Baglin his inability to comply at this time with the demand now made upon him for the return to Mr. Baglin of $75,000 par value of U. S. Government bonds known as "Old 4's."

2. Mr. Linderman likewise admits that, in view of the fact that the Metropolitan Trust Company will not continue the loan referred to in the agreements, dated June 19th, 1907, and July 17th, 1907, between him and Mr. Baglin, except upon a deposit of further collateral and an additional endorsement, such continuation of that loan upon such terms is not a renewal or extension of the original loan such as was contemplated by him and Mr. Baglin in paragraph V of the agreement of July 17th, 1907, and does not entitle him to an extension of his time to return said Government bonds, as
81 provided in the paragraph in question.

GARRETT B. LINDERMAN.

In the presence of
HENRY B. TWOMBLY.

NEW YORK, *September 26th,* 1907.

Southern Surety Company, Washington, D. C.

GENTLEMEN: Under date of the 10th of July, 1907, you issued your certain Bond or undertaking to the undersigned for the return to the undersigned by Garrett B. Linderman, of South Bethlehem, Pa., of U. S. Government bonds, known as "Old 4's," of the par value of $45,000, which the undersigned at or about said date loaned to said Linderman pursuant to an agreement whereby said Linderman agreed to return the securities in question as aforesaid.

I beg to advise you that Mr. Linderman has failed to return the bonds in question pursuant to the said agreement guaranteed by you, and that a formal written demand made upon him this day for their return has been refused.

Yours very truly,

GEORGE BAGLIN.

On further cross examination the plaintiff testified that he knew when he signed the letter to Linderman demanding return of the bonds, that the identical bonds had been redeemed, but made the demand "because it was optional with Linderman as to whether he

was to return me other bonds;" that he does not recall where he got that idea, but that it was his understanding at the time, that he had read the bond now in suit, which recited that Linderman had promised to return "the aforementioned securities," but did
82 not say the identical bonds—it might be other bonds of the same date; that he does not recall now that anyone told him that; that he had not agreed with Linderman on July 17 that plaintiff desired and expected him to return plaintiff cash and not bonds; that he agreed with him that he should return cash or bonds to the amount of $75,000; that this was put in at Linderman's request, because he was not willing to sell those bonds without something in writing to show that plaintiff was willing he should sell them, and that plaintiff put that into the agreement to show that he was willing that he should sell them, and that he stood by and saw him sell them; that, in his demand, he did not ask Linderman for money because he considered the bonds were the equivalent of cash; that he did not ask for the cash because it was optional with Linderman to return bonds or cash, and that he does not know that these papers of September 26 were gotten up so as to comply technically with what plaintiff thought was necessary to make the Surety Company liable.

83 The plaintiff further testified, on cross-examination, that Heinze left New York on the midnight train on Monday, February 7th, 1910, and that witness left at 6 o'clock on the same day; that Heinze remained in Washington until Wednesday night; that he had no business in Washington witness is aware of except this case; that plaintiff is still his secretary; that Linderman and Williams had several interviews with Heinze at which witness was not present at various times, probably three or four before plaintiff came into the matter at all, and he could not say how many afterwards, as witness was in and out of the bank a great deal, and Linderman was there practically every day for about two weeks; that he was in and out several times a day; that witness thought most of the interviews in which Heinze had part was before plaintiff was connected with the matter, because, up to the time the surety bond was given, Heinze left everything in witness' charge; that Linderman was there pretty much every day, sometimes when plaintiff was there and probably sometimes when he was not, because he was in and out several times a day; that he did not recall whether he ever came into the bank and found Linderman there. The plaintiff further testified on cross-examination, as follows:

"Q. Had you any other object in paying these expenses on these bonds, except to use them in this transaction? A. None whatever.

Q. So that we have $1200 paid for the use of those bonds for about half an hour? A. By Mr. Linderman.

Q. You bought them, in the first instance, so that he could use them in that way? A. Yes sir.

84 Q. Why did you do that? A. Why did I buy the bonds?

Q. Yes; and incur this cost of $1200.00 for somebody to use these bonds for a half an hour? A. To agree with the agreement that had been previously drawn.

Q. Was it for the purpose of enabling you to get the bond, for a purpose you wanted? A. It was.

Q. Why did you want a bond? A. I wanted a security or undertaking for the guarantee of the return of the bonds I was going to loan him.

Q. Why were you interested in that? You did not have to loan them, unless he got the bond? A. No.

Q. Why were you interested in getting the bond? A. He was the interested party.

Q. You were not interested at all? A. Only to the extent of making him a loan, if he complied with the agreement.

Q. Why were you interested in making the loan. I want to get at your interest in the matter. A. Because we had originally agreed to do so.

Q. Was that the only reason? A. I presume so.

Q. Did you not have $15,000.00 in an unsecured note? A. On what date?

Q. July 17th. A. Yes.

Q. How were you to get that paid? A. How was I to get it paid?

Q. Yes; was it through this surety company's bond? A.
85 Not necessarily.

Q. What other means had you? A. Mr. Linderman might have given me cash, for all I know.

Q. How is that? A. It was optional with Linderman whether he would give it to me in cash or not.

Q. Had you any security for it? A. I had not.
86 Q. And you looked to this bond transaction to get the money back. Is not that true? A. I did.

Q. And you were interested to that extent were you not? A. Yes.

Q. What assistance did you give him [Linderman] towards getting the bond from the surety company? A. I did not give him any assistance whatever.

Q. Why not? A. I was not called upon to give him any assistance.

Q. You left that for him, did you? A. Yes, sir.

Q. You did assist him thus far: That you went through this process so as to make it come within the bond, as to that? A. That was after I had got the bond.

Q. But you agreed to do that in advance of getting the bond; did you not? A. Yes, I did.

Q. And to that extent you did assist him in getting the bond, did you? A. Well, you might call it to that extent.

Q. Did you not know that your agreement to buy the bonds and loan them to him was simply for the purpose of enabling him to get a bond from the surety company? A. Yes.

Q. So, to that extent, you knew you were assisting him
87 to get the surety bond, did you not; you knew that, to that extent, you were assisting him to get this bond? A. I presume so.

Q. And that was the only object you had; was it not? A. Yes."

On re-direct examination the plaintiff testified as follows:

"Q. Did any one ever suggest, in your presence, what should be said to the surety company, in securing the undertaking in suit? A. Nothing whatever.

Q. Did Mr. Linderman ever talk with you or Mr. Williams about the details of his dealings with the surety company or its agents, in the effort to get this bond? A. No sir.

Q. Did anybody? A. No sir.

Q. Did you know anything of his dealings with the surety company? A. I did not.

Q. Did you ever suggest to Linderman or Williams that he should try to get an undertaking, without disclosing the details of your understanding and dealings with him? A. I did not.

Q. You stated that after the agreement of June 19th, either Williams or Linderman stated that the People's Guaranty Company did not desire to give a bond for the return of $45,000.00 cash. A. I think that is correct.

Q. Then you stated, did you not, that somebody suggested that they would give a bond for the return of securities? A.
88 Yes sir.

Q. Do you remember who it was that made that suggestion? A. It was either Williams or Linderman.

Q. Do you recall whether Williams or Linderman, at that time, said anything as to where they had obtained this idea? A. No.

Q. You do not recall? A. No.

Q. Did you ever hear any one make any suggestion that something be not disclosed to the Southern Surety Company, to secure an undertaking such as the one in suit? A. No; I never heard anything suggested of that kind.

The plaintiff further testified that he was not aware that any deception of any kind was practiced on the defendant; that he was never present at any talk with Williams and Linderman or with any one at which it was suggested by anyone that the defendant should not be advised as to the circumstances with regard to this transaction; that nothing whatever was ever suggested in his presence as to what should be said to the defendant in securing the undertaking in suit; that neither Linderman nor Williams ever talked to him about the details of their dealings with the Surety Company or its agents in the effort to get the undertaking in suit; nor did they ever report to plaintiff afterwards what he had said or done or what he claimed to have said, nor did anyone do so, nor did plaintiff know anything of the dealings of Linderman with the Surety Company; that he never suggested to Linderman or Williams that Linderman should try to get an undertaking without disclosing the details of plaintiff's understanding and dealings with Linderman; that after the agreement of June 19th either Williams or Linderman stated that the People's Surety Company did not desire to give a bond for the return of $45,000 cash; that somebody suggested that they would give a bond for the return of the
89 securities; that it was either Williams or Linderman; that he never heard anyone make any suggestion that something

be not disclosed to the defendant to secure an undertaking such as the one in suit or any suggestion of that kind.

The plaintiff further testified that the agreement dated July 17th, modifying the agreement of June 19th, was signed about two hours before the delivery of the receipt of July 17th and the delivery of the Surety Company undertaking—probably near one o'clock; and about two hours ahead of the delivery of the bonds; that there were no other agreements of any kind, either written or oral, between plaintiff and Mr. Linderman, except those of June 19th and July 17th, prior to the delivery of the undertaking in suit.

That the questions and answers read to plaintiff from his testimony in the suit of Baglin against the Title Guaranty & Surety Company in Philadelphia by defendant's counsel in this case were not part of plaintiff's direct examination in Philadelphia, but were part of his cross-examination and that in Philadelphia he also testified on direct examination that prior to July 17th, 1907, he had made no arrangement nor come to any understanding with
90 Linderman or Williams or either of them as to what they were to do with the bonds after plaintiff turned them over; that it was suggested by either Williams or Linderman that the bonds be turned over to Klein so that the Mercantile Bank could attend to having them redeemed at the subtreasury; that Mr. Heinze had given no instructions of any kind as to what was to be done with the bonds after plaintiff had once loaned them to Linderman; that plaintiff had not had any talk with Klein of any kind in reference to any contemplated arrangement whereby he was to attend to cashing the bonds prior to the time that plaintiff actually went to Klein's desk with the bonds; that there was no arrangement between him and Linderman of any kind as to what Linderman should do with the bonds after he got them; nor any understanding as to what he should do with them prior to the time the actual talk came up about it.

That in Philadelphia, during his cross examination, plaintiff also testified that he could not say at that time that it was previously arranged to turn the bonds over to Mr. Klein but that in point of fact that was what was done; that he gave his testimony in the same suit in which he gave the testimony read to him by Mr. Darlington in the case at bar upon his cross examination.

And on cross examination the following ensued:

"Q. You said that no suggestion was made that the Surety Company should not be advised of the proceedings you were going through with to make it liable for the money, is that correct? A. No what?

Q. That no suggestions were made that the company should not be advised of the method you were taking to make them liable for the payment of money? A. There was no discussion of that at all.

91 Q. There was no suggestion that it should not be advised and none that it should be, was there? A. There was not either way.

Q. You knew they were unwilling to go on a bond to return money and you knew they were going to try to get a bond and you discussed it with them but did not suggest that they should be told what you were aiming to do? A. I did not, no."

The plaintiff further testified that the Philadelphia suits were tried in either October or November, 1908.

The plaintiff further introduced as a witness on his behalf EMIL KLEIN, who testified that he is and on July 17, 1907, was cashier of the Mercantile National Bank of New York, and had been connected with it since 1882, that Heinze was its president from January to October, 1907; that he had known Heinze but slightly; that on July 17th, 1907, plaintiff came to his desk and introduced to him Linderman and Williams; that they requested him to collect $42,-850.00 of bonds, and he told them it was too late to do so that day; they then asked him to advance $30,000 on the bonds to Linderman, and to account to Baglin for the residue of the proceeds after they had been collected; he thought he got the bonds from Linderman or Williams, but the three came together to his desk; that the conversation was between the three; that he gave Linderman a cashier's check for $30,000, which he produced and identified; that he gave Bagling a check the next day for $12,876.51, which he also produced and identified; that these checks aggregate exactly what was paid by the Sub-Treasury in redemption of the bonds, except a small expressage, which the bank paid in cash to the subtreasury; that there was one quarter's interest or three months' interest paid on the registered portion of the bonds and one day's in-
92 terest on the whole amount of the bonds; that prior to their visit to his desk he had had no conversation with Linderman or Baglin in reference to this transaction nor with Mr. Heinze; nor had he received instructions or advance information from anyone about the matter, nor did he refer it to anyone when asked about it, and that the transactions were not charged to the account of anyone in the bank but were carried as cash.

Baglin, Linderman and Williams again came to his desk with the request that he collect $32,050.00 of Old 4's, that he advance $30,000 in a check to Linderman, and account to Baglin for the balance, after the bonds were collected; that the bonds were delivered by Williams or Linderman; that he gave Linderman a check for $30,000, which he produced and identified; that he caused the bonds to be redeemed on the following day, and gave Baglin a check for $2,076.88, which he produced and identified; that the conversation was all blended together, and he could not tell what anyone of the parties said; that there was $28.66 of interest due on the bonds in the July 17th transaction, and that there was some interest due on the $30,000 transaction of July 25th—that there was one day's interest on the $32,050.00 and there may have been more; that, if any of the bonds were registered, it would be a quarter's interest on that portion and one day's interest beside; that the transaction was carried in cash because the bank had no interest in it; that witness practically cashed the bonds at the request of these parties; that, in

saying that Bagling and the other two men asked witness to collect the $32,050.00 he means to have the bonds redeemed; that no one objected to this, and it was in accordance with the request of all three so far as he understood it, and that the same thing was
93 done in the July 17th transaction; that he has not attempted to apportion the conversation between these three men—that was the conversation of all three with witness, none of them dissenting from what the others said.

And thereupon the plaintiff rested.

94 The defendant called as a witness on its behalf Mr. EMERY, attorney for plaintiff, who testified that his partner, Mr. Kellogg, prepared the June 19th agreement, that witness prepared the first agreement of July 17th, and that Twombly and witness together prepared the receipt of that date, witness dictating the receipt portion of it and Twombly suggesting the rest of that instrument, which witness dictated, namely the part in which Mr. Baglin expresses his willingness to accept money instead of bonds; that witness also prepared the three letters of September 26; that witness was asked to go up to the bank on that date, which he did; that Linderman was there and there was some talk about what Linderman could do in regard to returning the bonds, and there was an explanation about his inability to do so, and it was at the suggestion very likely of witness that this was put in the form of a letter and reply, and that this was done while all the parties were present; that, on July 17th, Mr. Twombly stated that Linderman intended to dispose of the bonds, and that Linderman thought there ought to be some understanding that he would not have to return these particular bonds; that Linderman's counsel and witness had quite a conversation about the matter, and witness said if it would make Linderman any more comfortable, he had no objection to having Baglin express in writing the intention he had expressed orally, but that Mr. Linderman's counsel ought not to ask witness to have Linderman and Baglin seem to make some agreement, because that might be used for the purpose of a technical defence by the surety company, as some sort of a variation—that witness refers to the provision stating that Baglin desired to accept money instead of bonds; that this receipt was prepared before the bonds came over and before anyone knew exactly how many bonds were to be
95 received; that witness left the bank before they were received and thinks he never knew before the Philadelphia trials the exact amount; that he saw the charter of the defendant company prior to July 17th; that he did not talk with Washington over the long-distance 'phone, but made the request to be furnished with the charter either through Mr. Parker or Mr. Twombly; that some one may have telephoned by long-distance to have the charter sent up, but he does not recall that either he or anyone in his office did so; that he saw the bond, in complete, two or three days before July 17th, and called the attention of either Parker or Twombly to something technically wrong about the corporate ac-

knowledgement. The witness further testified that he did not prepare the bond in suit, and that it was not prepared in his office.

On cross-examination the witness was asked if there was any special reason discussed between all parties on September 26th, as to why the matter should be put in written form, and stated, in answer, that the agreement of July 17th contained a provision that if the Metropolitan Trust Company would extend the time of its loan to Baglin and Linderman and if the Surety Companies would expressly consent that Linderman might have a like extension of time to return the Government bonds, Baglin would grant Linderman such additional time. On September 26th at the bank it was explained in the presence of all what the Metropolitan Trust Company was willing to do and Linderman and his counsel Twombly both asked if Linderman might not have more time, and witness stated that it was essential that Linderman secure the express consent of the Surety Companies and that there must be no understanding of any kind that Linderman would be given any further time by Baglin, except on that understanding, and in order that there
96 should be no doubt about it, when witness found that the Trust Company required further collateral and that Mr. Heinze was to sign a new note, he prepared the statement about an extension and submitted it to Linderman's counsel, after which Linderman signed it."

97 The defendant, subject to the general objection and motion to strike out, further to maintain the issues on his part joined, read the deposition of GARRETT B. LINDERMAN, in which he testified that Williams suggested to him the making of a loan by himself and Baglin from the Metropolitan Trust Company of $200,000; that Mr. Baglin put up as the security for that loan shares of United Copper common stock, he does not remember how many (p. 5), which shares belonged to Heinze; that at the time witness did not own 6700 shares of United Copper Common stock, or any such quantity; that he was to receive $75,000 of the loan and Baglin the rest, and the return of the $75,000 by him to Baglin on September 26th, the date of the termination of the loan at the Trust Company (p. 6), was to be secured by a bond of the People's Surety Company; that Heinze told witness he understood they would not issue such a bond, witness does not remember the reason why (p. 8); that in the office of Heinze's counsel, where witness went, not on his own initiative but where Heinze told him to go (p. 9), witness thinks either Mr. Williams or Mr. Kellogg said something about taking another method of getting a surety company to go on said bond (p. 8); that witness finally secured the Southern Surety Company and the Title and Guaranty Surety Company to go on his bond to guarantee the return to Mr. Baglin of $75,000 worth of government bonds known as "Old 4's" (p. 9); that this change from the scheme of having the surety company guaranteeing the return of money to guaranteeing the return of government securities, was the suggestion of Mr. Williams, at a conference in Mr. Kellogg's office at which
98 Mr. Kellogg was present at the time when witness went to that office at the direction of Mr. Heinze (p. 10); that Baglin did

not then have any government bonds known as "Old 4's"; that Heinze's counsel drew up the agreement of June 19th; that witness received from the Southern Surety Company its bond guaranteeing the return by him to Baglin of $45,000 worth of U. S. old 4's by the 26th of September and delivered it to Baglin on July 17th; that he had previously received from Baglin $15,000 upon a one day note; that witness made arrangements for the purchase of the government bonds, ordering them from Levinson, a broker whose messenger brought them to Baglin, who counted them, took the numbers, and returned them to the messenger to be sold; that witness did not on that occasion, or ever, have the bonds in his hands or possession, or any part of them, but that Baglin gave him a check for $30,000 and returned to him his note for $15,000; that witness saw Baglin count the bonds but did not know how many there were; that on the same occasion, simultaneously, witness gave Baglin two checks, one for $52.50 and one for $552.50, being the interest on the $15,000 note and the difference between the purchase and the selling price of the bonds (pp. 14-15); that Baglin figured the difference between the purchase and the selling price, and there was a broker's commission on the purchase and also on the sale, which witness thinks was included in the check; that on that occasion witness signed a statement in the form of a receipt, which was drawn up by Baglin's counsel, which witness signed as a matter of form at Baglin's request, and after reading it
99 through before signing it; that it was understood between Baglin and witness that witness was to get the money invested in the bonds, that they always had this understanding—that it was witness' understanding to receive the money, and it was a matter of indifference so far as the value was concerned whether Baglin should give him the bonds or the money (p. 17); that government bonds are so nearly money that there is no difference; that when he signed the receipt of July 17th, stating he had received $45,000 par value of government bonds known as "Old 4's," he had received a check which he knew to be good for $30,000, and his cancelled note for $15,000 (p. 18); that he did not then know, nor was it any of his business, whether Baglin had then bought the full $45,000 worth of government bonds or only $42,850 worth (p. 18); that on a later occasion July 25, 1907, he actually received bonds of the par value of $30,000, and gave the undertaking of the Title Guaranty and Surety Company, Mr. Williams, probably Mr. Baglin, and he thinks Mr. Twombly and Mr. Emory being present (p. 19); that he gave the bonds to Klein to be sold, and received a cashier's check for $30,000, witness being assessed on this transaction also with a broker's commission and the difference between the purchase and the selling price of the bonds, for which he gave Baglin his check for $652.12; that witness knew of the loss on the resale of the bonds from the fact that the broker's messenger spoke about it; that Mr. Baglin finally told witness the exact sum which he owed upon such loss, for *for* which he gave his check (pp. 21-22); that the letters of September 26th, one of them signed by witness, was written

he thinks, by Mr. Emery, that the language is not witness',
100 that Mr. Emory and Mr. Twombly were present when the papers were drawn up, that witness signed with his attorney's consent (pp. 23-24); that witness was introduced to Heinze by Williams, between whom and Heinze there had been, he understood, a prior acquaintance; that in the second transaction there was no agreement between Baglin and himself that, in the event witness should receive any government bonds, they should be sold so as to be converted into cash—Baglin simply took the bonds from the messenger and gave them to witness, who turned them over to Klein, and Baglin gave witness a check (p. 26); and that, in the first transaction in which the defendant's bond was given, witness never received the government bonds but received a check for $30,000 and the return of his $15,000 note.

On cross-examination witness testified to the effect that since the summer of 1907 and subsequently to the time when Baglin commenced suit against him, arising out of these transactions, a petition was filed against the witness in involuntary bankruptcy; that in the proceedings witness had been examined about a great variety of business affairs covering a great many years, and transactions of a great number (p. 28); that there were three similar transactions in the summer of 1907 between witness Baglin and Klein, in all of which he knew the other parties were acting for Heinze (p. 28); that the U. S. 4's at that time were being redeemed at the United States Sub-treasury, and witness knew cash could be obtained for those bonds as readily from the Sub-treasury as from a bond broker,
and that Klein could send a messenger to Wall Street and
101 get money for them (pp. 29-30); that witness was then the Vice President and a director in the Lehigh Valley National Bank, with which bank he had been connected as an officer for a number of years: that in July, 1907, he had known Williams for about a couple of years, during which time he had not met Heinze; that he can recall being introduced to him by Williams (pp. 30-31); that Williams probably knew it would be agreeable to witness to raise money, as the times, financially, were very hard for everybody (p. 31); that the People's Surety Company did not tell witness the reason why they did not care to go on the bond for $75,000 cash, witness' knowledge as to why they did not care to do so is hearsay on his part (pp. 34-35); that Williams subsequently suggested at the office of Mr. Kellogg and Mr. Emory that perhaps the Surety Company would write a bond in connection with this matter if the form of the transaction had to do with securities; that Mr. Kellogg did not suggest anything about what companies witness should go to, or anything about making an application for such an undertaking, and that his part, whatever it was, was what witness has testified to, that he was present at the conversation when this suggestion as to a change of form was made (p. 35); that witness did not see any other surety companies, but saw a gentleman who represented surety companies, Mr. George T. Parker, of Philadelphia, who represented the Title Guaranty and Surety Company of Scranton, and who acted for the Southern Surety Company (pp. 35-36); that, besides Parker,

witness had dealings with reference to the issuance of the undertaking of the defendant company with a Mr. Simons and
102 with a Mr. Proctor, who was associated with Mr. Parker, and with no one else that he remembers (p. 36); that he did not consult with Kellogg, Beckwith, Emory, Heinze or Baglin about those details about the applications, premiums, etc.; that he informed them that he was trying to get an undertaking, but did not refer anything as to the details of the progress with which he was arranging the details by which he should get the surety (p. 37); and that this was done entirely by himself (pp. 36-37); that he does not recall, but presumes he signed a written application to the defendant for the undertaking in the suit; he thinks he signed some sort of an indemnity agreement, and a statement purporting to show his financial condition, and he paid a premium; that his dealings with Parker in reference to securing the defendant's undertaking were had for the purpose of carrying out his arrangement with Baglin (pp. 37-38); that as near as he can recall it he received the defendant's undertaking in the offices of Mr. Twombly, who had been his attorney for a few months, and had represented him in connection with the loan from the Metropolitan Trust Company; that he received the undertaking through Mr. Parker, as he recalls it, on the day of the first government bond transaction, July 17, 1907, but he does not remember that Parker went to the bank with him; that Twombly must have been present at the bank on July 17th; that he thinks Twombly saw the supplemental agreement of that date and the receipts for the $45,000 worth of bonds before witness signed them; that probably, although he does not remember it, he stated to Twombly, who came over and spoke to Emory, about the
103 paragraph in which Baglin said it was his desire and intention to accept cash instead of bonds (pp. 39-40); to a question whether he thought the paragraph in the receipt stating that Baglin represented to Linderman his desire and intention to accept from Linderman at the time the bonds were returnable, the face value of the bonds in cash and interest, he answered, "I never thought much about it," and that he thinks counsel drew the papers up (pp. 46-47); that as to this as well as to the supplemental agreement of July 17th his counsel, Mr. Twombly, was consulted; that at the time of the July 17th transaction Baglin held the $15,000 one day note, and to the question "Can you think of any other reason why Baglin cared what you did with the balance of the bonds beyond what was necessary to secure this $15,000," the witness answered, "Only what he had paid for the bonds and wanted to get the money back"—that he sold the bonds and got the money back that way (p. 47), and thereupon the following ensued:

"Q. So far as your transaction with him was concerned, I ask you again if you can think of any reason why, after Baglin got back his $15,000 for the one day note and got this surety company undertaking of the Southern Surety Company, he had any interest in whether the bonds were sold or not? A. I never paid the note.

Q. He got $15,000 on that occasion, did he not, and delivered your note at the same time? A. Not from me, he never did.

Q. He gave you back your promissory note, did he not? A. Certainly. He never got money from me to pay the note.

Q. You did not give him your check for it? I am asking if whether, beyond that, you know of any reason why Baglin should have been interested in whether these bonds were resold? A. Nothing that I know of."

On his redirect examination the witness Linderman further testified that he did not mean to say that Parker was acting for the Southern Surety Company; that he was the person witness
104 knew in the transaction; that no officer of the defendant company told him that Parker was its agent; that he knew he was the agent of the Title Guaranty Surety Company; that Proctor and Simons were not the agents of the Southern Surety Company; that Kellogg did not suggest the plan to procure a loan of money in the form of *of* government bonds, but that he approved of it (p. 53); that he thinks Kellogg or his associates passed on the form of the defendant's undertaking (p. 53).

On his re-cross examination the witness Linderman further testified that he paid to Parker a sum of money to get the bond, but never knew what Parker paid the Southern Surety Company; that Parker said it was the sum it would cost witness to get the bonds; that he knew Parker was the agent for the Title Guaranty Surety Company from his letter heads, and because he told witness he was.

Thereupon WILLIS W. PARKER, called as a witness on behalf of defendant, identified the application for the undertaking in suit and an accompanying indemnity agreement in the words and figures following:

105 Agency D. C. 22.

Approved
R. T. H.
W. W. P.
L. M.

Application for Commercial Bond.

For Contracts Other Than Building Operations and Undertakings Other Than Judicial Proceedings.

Application is hereby made to the Southern Surety Company, by the undersigned, for a bond or undertaking, the nature of which is set forth below, in the sum of $45,000, and running to or in favor of George Baglin, New York, N. Y., to take effect July 10th, 1907, and answers are made to interrogatories, as follows:

1. Applicant's full name? Garrett B. Linderman.
2. Applicant's business? Banker, etc.
3. Business address? South Bethlehem, Pa.
4. Give full particulars regarding the bond required. (If License bond of any character, send copy of ordinance covering and form of bond required. If Franchise bond, send copy of Franchise and state if Annual bond will be accepted or if bond must cover entire

period. If bond covering Lost Documents, send affidavit showing when and where they were last seen and all relative facts.)

This bond is to be given to George Baglin guaranteeing the return on or before September 25, 1907, of the following securities: U. S. Government Old 4's in lieu of United Copper stock, the property of G. B. Linderman and deposited in pooling agreement.

5. How long will bond probably be in force? September 25th, 1907.

6. Statement of Applicant's Assets and Liabilities. (Show fully. Answer each question; if none, write "None.")

Statement of Garrett B. Linderman & Co., of South Bethlehem, Pa.

Assets.		Liabilities.	
Cash in hand not deposited in bank..	$.....	Capital stock paid in..	$.....
Cash deposited in following banks ..	.....	Mortgage bonds	.....
Stocks and Bonds (market value) ..	1,130,000	Bills payable to banks.	.....
		Other Bills Payable...	72,000
		Borrowed money on open account	230,500
106			
Real estate consisting of property in Bethlehem, Pa. and Fishers Island, N. Y.....	169,000	Mortgages on real estate bonds and mortgages	20,500
Merchandise on hand consisting of	.....	Accounts payable for labor	.....
Bills receivable	.....	Accounts payable for material or mechandise	10,000
Accounts receivable.	74,200	Other liabilities (in detail)	.....
Other assets (in detail)	70,000		
Total assets..	$1,443,200	Total liabilities.	$333,000

7. In whose name is the title to Real Estate? Garrett B. Linderman.

8. State your annual income from all sources.

Gross ——. Net. ——.

9. Are you surety or endorser upon any bond, note, or other obligation, not included in your liabilities shown above. If so, give names and amounts. No.

10. Are there any judgments against you? If so give particulars. None.

11. Are you threatened with any law suits? If so, give particulars. None.

12. Have you ever failed in business? If so, give particulars. No.

13. Is your life insured? If so, state for whose benefit, in what

amount and in what companies? $300,000. Newark Mutual Life, N. Y. Equitable and Washington Life. Payable to my estate.

14. What indemnity do you offer for this bond? Garrett B. Linderman, individual bond.

15. If corporation, answer these questions.

Exact Corporate Title. ——. In what state incorporated? ——. When incorporated? ——. Principle office. ——. Authorized Capital. ——. Capital subscribed for? ——. Capital paid in cash? ——. President's name? ——. Vice President's name. ——. Secretary's name? ——. Treasurer's name? ——. Directors' names? ——.

16. What amount of Fire insurance do you carry? ——.

17. If a co-partnership, give the names of all individuals composing same:

107 Names.	Addresses.	Ages.
Garrett B. Linderman.	South Bethlehem, Pa.	48.
S. D. Kynor.	Pottsville, Pa.	—.

NOTE.—(A separate personal statement on Form 100 must be executed by each member of the firm, showing his individual assets and liabilities, exclusive of his interest in firm's assets and liabilities.)

Names.	Occupation.	Address.
Richard T. Green.	Lawyer.	43 Exchange Pl. N. Y.
T. M. Dodson.	——.	——.

In consideration of the execution of the bond herein applied for, the undersigned hereby covenants and agrees with the Southern Trust Company as follows:

1. That all the answers and statements above set forth are full, true and correct.

2. That the undersigned will pay the Company the sum of $450.00 as premium for the execution of said bond, and the further sum of $450.00 for each and every year, after the first year, said bond is in force, which sum is to be paid annually in advance on the 10th day of July of each and every year during the time the Company shall be and continue liable upon the said bond, and until the Company shall have been fully discharged and released from any and all liability upon said bond and all matters arising therefrom, and until there shall have been furnished to the Company, at its principal office in the city of Atoka, Indian Territory, proof satisfactory to the Company, by evidence, legally competent, of such discharge and release.

3. That the undersigned will, upon being requested to do so by the Company, procure the Company's discharge from liability under said bond or undertaking; and the Company is hereby given the right, at its option, to use the name of the unde-signed for that purpose, it being the intention to give the Company all the rights of the undersigned, in securing its release and discharge from said bond,

and the Company shall have the right to be discharged from liability for the further default of the undersigned, and, at any time,
108 to require the undersigned to account and give new surety or sureties.

4. That the undersigned will, upon the termination of the liability of the Company, under bond herein applied for, furnish the Company with evidence of the termination of its liability under said bond.

5. That the undersigned will at all times indemnify and keep indemnified the Company and save it harmless from and against all claims, demands, liabilities, costs, charges and expenses of every kind or nature, which shall at any time be made or which it shall at any time sustain or incur, and will pay over, reimburse and make good to the Company, its successors and assigns all sums and amounts of moneys necessary to meet every claim, demand, liability, cost, charge, expense, suit, order, decree, judgment and adjudication against it by reason of the execution of the bond or undertaking herein applied for.

6. That the undersigned will immediately notify the Company at its principal office, Atoka, Indian Territory, of the making of any claim or of the commencement of any proceeding, or of the notice of a probable loss, under said bond or undertaking, which the Company may be called upon to pay or discharge by reason of the execution of said bond.

7. That the vouchers or other evidence of payment by the Company, in discharge of any liability under said bond or undertaking, shall be prima facie evidence against the undersigned of the fact and amount of the undersigned's liability to the Company.

8. The acceptance of this agreement and the agreement to pay premiums for said bond, or the acceptance at any time by the Company of other security, shall not in any way affect or limit the right of the Company to be subrogated to any right or remedy, or limit any right or remedy which the Company may otherwise have, acquire, exercise or enforce, and the Company shall have the rights and remedies which an individual surety, acting without com-
109 pensation, would have.

In testimony whereof, Witness the hand and seal of the undersigned, this 10th day of July, 1907.

GARRETT B. LINDERMAN, [SEAL.]

By —— ——.

(Partner's or Officer's Name.)

Witness:
GEORGE H. PROCTOR.

NOTE.—If co-partnership, firm name must be signed with the partner's name on the line below who has signed the firm's name.

If corporation, corporate name must be signed in full, with the officer's name and title on the line below, and corporate seal affixed.

Agents are instructed to forward this application, with all relative papers, to the home office of the company for execution of the bond.

110 The witness Willis W. Parker, subject to objection on behalf of the plaintiff and his right later to move to strike out, on the ground that the defendant could not prove issues which were not properly in the case, and on the further ground that the testimony about to be given by the witness was not shown to be in any wise connected with the plaintiff, and that the latter was not bound by any representations or applications made by Linderman, further testified that he was resident associate manager of the Title Guaranty and Surety Company and had been connected with surety companies since April, 1904; that his father George T. Parker wrote witness from Philadelphia, sending him the application of Linderman to the Title Guaranty and Surety Company, and asked him to make an application to the Southern Surety Company for a bond from the data contained in that application; that witness prepared the application to the surety company, condensing it from the application to the Title Guaranty and Surety Company which George T. Parker had sent him; that the latter application stated that Linderman had some copper stock which was up a pooling agreement with Heinze; that Heinze was to lend him some bonds known as Old 4's, which Linderman was to use as collateral until the ending of the pooling agreement, when Linderman was to return the old 4's, and this is what witness intended to express, in a condensed way, in the application to the Southern Surety Company; that Mr. George Parker also wrote witness a letter in connection with the matter, from which letter witness got the information that the pooling agreement would terminate on September 25th, 1907; that neither witness nor George T. Parker were at any time employed by the defendant, and that the witness's only connection with the defendant was a friendly one, owing to the fact that it was just starting

111 in business in Washington, with Mr. Leroy Mark as its representative, and that an arrangement had been made by the defendant that Mr. Mark might accept risks and give its undertakings in cases in which the application had been first approved by Mr. Mark, witness and Judge Robert G. Hough; that witness approved the application for the undertaking in suit upon the data so furnished him by George T. Parker; that if he had been informed that the Old 4's were to be simultaneously bought and sold again to raise money, partly for Linderman's use and partly to pay an antecedent debt he owed Baglin, he would not have approved the application; that in the course of his connection with the company and of his membership in the local Association of Surety Companies, he had become familiar with the rules and usages of surety companies as to the character of business they will accept, and that a surety company would not execute a bond guaranteeing the payment of a debt, unless it was fully indemnified by either cash or marketable securities.

112 On cross examination the witness testified that the question in executing a bond for the payment of money, would be how well secured it was, and, if they were satisfied that they were sufficiently secured, they would feel justified in writing a bond for

the re-payment of money; that he did not investigate personally the financial standing of Linderman; that the statement of Linderman's financial standing was transmitted, with the application data, from Bradstreet & Dunn's; that the application to the Title Guaranty and Surety Company which he received from George T. Parker, shows nothing about Mr. Heinze; that this was in the letter from George T. Parker received before the Southern Surety Company undertaking was written; that the application to the Title Guaranty and Surety Company said nothing about when the United States copper stock was to be released from the pooling agreement, nor anything about the substitution of the bonds for the copper stock, or vice versa; that all these various things about which he has testified, such as the time when the end of the pool was to come, and the fact that Mr. Linderman was to use the bonds as collateral, was not secured from Linderman's application, but in some other way (pp. 199-200); that he knew before the bond was written that Heinze was the person particularly interested on the other side from Linderman in the transaction, from George T. Parker's letter; that George T. Parker and witness are still representatives of the Title Guaranty and Surety Company which wrote the two $30,000 bonds to Baglin, on which undertakings Baglin sued that company; that witness never had any dealings with Linderman personally; that he never saw Baglin until he saw him in court, and had never had any communication with him or Heinze; that all the information he had before he approved the bond was obtained from the application to the Title Guaranty and Surety Company, the letter
113 from George T. Parker, and the report from Dun's and Bradstreet's; that the bond was approved upon the facts contained in the application and the letter from George T. Parker explaining the deal, and the report of the mercantile agencies, which was satisfactory (pp. 201-202); that the personal indemnity agreement with Mr. Linderman was taken, to a certain extent, upon the strength of the Dun's and Bradstreet's reports, and there was nothing except the reports of Dun's and Bradstreet's as to the financial standing of Linderman; that the application to the defendant was prepared by the witness personally and sent to Philadelphia to George T. Parker for Linderman's signature; that he did not send the undertaking to Philadelphia with the application; that Mr. Mark had the handling of the bond; that witness attested the execution of the bond in suit by Mr. Mark; that he could not say whether the bond and the application went forward to Philadelphia at or about the same time (p. 204).

On redirect examination witness testified that he sent the application to Philadelphia to be signed by Linderman before the bond was approved; that he could not explain why the application and bond bore the same date, or say whether the application was dated after it was returned.

On re-cross examination the witness testified that the amount of indemnity or collateral required was not governed by the financial responsibility of the applicant where it is a financial guarantee; that

the witness had issued no financial guaranties, but had had applications for them, and that the parties did not come back when
114 informed that either cash or marketable securities had to be put up as an indemnity; that he has written appeal bonds without collateral; that one reason for doing so would be where the person for whom it was written was a man who had means and witness knew all about his financial standing.

On re-direct examination witness testified that he does not still write appeal bonds for anybody without collateral—that it is not done now, but has been done heretofore; that the modern rule is not to do it without collateral for the full amount.

On re-cross examination witness further testified that he could not state that other companies than the Title Guaranty & Surety Company do not write appeal bonds at times for certain individuals without collateral, but that it is not done in Washington.

The witness Willis Parker further testified that he forwarded a copy of the charter of the Southern Surety Company to a firm of lawyers in New York, whose address was given by Mr. Leroy Mark; that he could not recall the firm name, but that Kellogg, Emory & Beckwith sounded something like its name. This witness further testified that the letter from George T. Parker, which brought the application for the undertaking in suit to his attention, stated that the pool in which it was alleged Linderman's copper stock was deposited would break or terminate on September 25, 1907, as witness recalled it.

The defendant further called as a witness on its behalf LE ROY MARK, who testified that his connection with surety companies extended over seven or eight years, during which time he had
115 represented the National Surety Company and the Southern Surety Company; that he executed the bond in suit as the representative of the Southern Surety Company, under an arrangement with that company that witness might execute bonds or undertakings for it when approved by Judge Hough, Mr. Willis Parker and himself; that he had approved the application of Mr. Linderman for the bond in suit; that the application had been presented by Willis Parker, who laid before witness the facts testified to by him as coming from his father Geo. T. Parker, and that the witness approved the application upon these facts; that if he had been informed, had known, or suspected that the real transaction intended by Linderman and the plaintiff was that upon receipt of the undertaking, they would buy the Government bonds, simultaneously selling them again, giving Linderman the proceeds, pay out of them an antecedent debt which Linderman owed Baglin, and rely on this undertaking as Baglin's indemnity for being made whole on the transaction, would not have accepted the application, nor considered it at any price or premium; that he had never known a surety company to execute a bond to guaranty the payment of a debt, as this would have been, and that he had never been authorized by the defendant to execute such a bond as that; that, in the course of his

connection with surety companies, he had knowledge of their
116 rules and custom in regard to the character of risks they
would undertake, and that they do not even consider applications for bonds to guaranty the absolute payment of money or debts, and that surety companies do not accept such applications.

This witness further testified that, on returning to his office one day, he found a telephone message from New York, to call up Kellogg, Beckwith and Emory; that he did so, when one of the firm came to the telephone and stated another member of the firm, whose name witness does not recall, was familiar with the transaction and would talk with him; that another party came to the phone, and asked witness if they had a copy of a charter of the Southern Surety Company; that the witness Willis Parker had received a letter asking for the same thing, and had gotten a copy of the charter from the Department of Justice; that witness told the party over the phone that the charter would be forwarded to them in that night's mail; that he requested Parker to forward it to Kellogg, Beckwith and Emory, and that so far as he knows this was done.

On cross-examination witness testified that he had never talked with Geo. T. Parker subsequently to the delivery of the bond, about the delivery of the charter of the defendant in New York; that he was positive it was not Twombly who telephoned for the copy;
that whether the amount of collateral or security required
117 depended upon the financial standing of the person guaranteed depended on what kind of bond it was, and that there were bonds in which they cut some figure; that his impression was that the bond in suit was written, executed and forwarded to Philadelphia all on the same day, having been prepared either in Willis Parker's office or his own; that he knew that securities like Government bonds, other bonds and stocks are borrowed at times for the purpose of being used, and he could think of no such use except either for sale or for borrowing on them as security; that he is still connected with the Southern Surety Company; that, before executing the bond, he communicated with Willis Parker and Judge Hough, and the defendant company, and that he got a rating on Linderman through the Commercial National Bank, which he sent to the defendant after the bond was executed; that the application arrived at the office in the morning and the bond was mailed that evening; that the application was signed by Linderman before the bond was given to Mr. Parker to mail to his father, who was to deliver it to Linderman; that he recalls the application and the bond both bore date July 10th, but that he is definite and positive in stating that the application came back into his possession before the undertaking went out of it; that the undertaking was going to Parker's father, who is a surety company man, and who had been in this line of business to his knowledge for a
number of years, but that made no difference to witness,
118 who would not deliver a bond until he had the application.

On re-direct examination witness testified that Geo. Parker had not been connected in anyway at any time with the defendant; that he first heard of Twombly after September 25th, after the

liability had been asserted, that, before writing the bond, he saw the letter from Geo. Parker to Willis Parker, of which the latter testified, explaining in detail what the bond was for, and that its contents were as testified to by Willis Parker; that, in stating on his cross-examination that he understands when securities are borrowed they are to be made use of either by selling or by hypothecating them, he did not suppose they were to be sold; and, on re-cross-examination, that he knew, if hypothecated to secure a loan, they might be disposed of by the lender, and in that case would not come back, but that they were never hypothecated to their full value. This witness further testified that George T. Parker represents the Title Guaranty & Surety Company in Washington and Philadelphia, also; and has an office in both cities and spends most of his time in Philadelphia, and that witness presumes he is a member of this same association about which there has been some talk.

Thereupon CHARLES S. COBB, president of the defendant company, testified under objection and subject to a motion to strike out this and all similar testimony at the conclusion of the evidence as immaterial, irrelevant and incompetent that the defendant company had never been at any time in the business of issuing bonds guarantying the absolute payment of money or a debt; that it never undertook
119 that line of business, because they had never understood they had authority to do it, and it was a line of business they regarded as hazardous; that they regarded bonds guarantying the payment of money as more hazardous than bonds guarantying the return of securities, and that they would not have made or authorized a bond guarantying the return of money. This witness further testified that he was present at an interview with Mr. Geo. Baglin on October 9th, 1898, Dr. Johnston, the Vice President, also being present, on which occasion they asked the plaintiff if he bought the bonds to lend to Linderman, and he stated he had; that they asked him what Linderman wanted to do with the bonds, and he answered "to sell them to get money;" that they asked if when he lent the bonds, he expected Linderman to sell them, and that he answered that he did expect it, that what Linderman wanted was money, and that Dr. Johnston asked why he did not lend money in the first place, instead of buying bonds for him and selling them again, and plaintiff replied that they could not get a surety company to give an undertaking to return money, but could get one to guaranty the return of bonds. On cross examination, the witness to the question whether he considered there is a great difference between Government bonds that are being redeemed by the Government and money, answered "Well, in one way, no;" being then asked whether he would as soon have Government bonds as money, he answered he would a little rather have the money; that he is a long way from the sub-treasury, and there is some expense and red tape about redeeming bonds; there might be a question whether the title to them was good; that if he were in five minutes' walk of the treasury where they would be redeemed for cash and it didn't cost him anything, and he knew he had a

good title to the bonds, he would about as soon have them as
120 the money. Asked what was the difference between having
A loan to B a Government bond for $1,000, which is already being redeemed, and lending him a United States Treasury note for $1,000, he answered that the securities, if they are to be returned, can only be used, if at all, as collateral, could not be used for their full face value, and you could not lose the whole of them; asked whether it would surprise him to learn that on Government bonds now due and payable, it might be possible to borrow very close to their full value, for a short time, he answered that he did not believe you could borrow any better on them, and not quite so well as on those not due; that, as collateral, you could borrow about 80 per cent of their market value; asked whether the interest for two months at six per cent would be one per cent, he answered yes, and being asked whether he thought it would be difficult to borrow more than 80 per cent on the par value of such bonds, overdue for two months, he answered possibly a little more, but not more than 90 per cent in any event; that they have definite rules in New York, and he thought it was 80 per cent on both ordinary street security and Government bonds; that he had heard of banks that loaned up to 90 per cent, but never more; that a guaranty to return a piece of property or security partakes of the nature of a trust, and is quite different from a financial guaranty for the return of money—a party would have to break his contract, convert the property, against his agreement, in order to make the surety liable; that a guaranty for the return of securities is not uncommon with surety companies, but witness' knowledge was that they never made a guaranty for the return of money; that securities are ordinarily borrowed to be used as collateral, and that he had never heard of
any being borrowed for sale; that when a party uses them as
121 collateral, there is danger that they may have to be sold;
that wealthy men sometimes have no property listed or in proper form to be used as collateral in a city like New York, and sometimes borrow from one who has, to be used in the usual course of business, to raise money. On re-direct, the witness testified that neither the Simon nor Proctor referred to in the testimony was ever in the employ of the defendant company, and on further cross-examination that neither George T. Parker nor Willis Parker had ever been in its employ, and to the question whether it was not a fact that at times it wrote bonds b-ought to it by them, he answered that the bond in suit might be considered to have been brought to it by George Parker, that he did not remember that he brought any other, and the- he never knew or met him.

The defendant thereupon produced and offered the charter of the defendant in support of the claim of the preceding witness that one of their reasons for being unwilling to enter into a guaranty for the payment of money was that this would be a violation of their charter; but this was objected to on the ground that it was immaterial, irrelevant, incompetent and not covered by the pleadings, and was not admitted, to which ruling there was no exception.

ROBERT T. HOUGH, called as a witness on behalf of the defendant, subject to the objection and motion to strike out later heretofore noted, testified that he had been connected with surety companies for about ten years; that he was an honorary member of the local association of surety companies as counsel, and attended most of their meetings; that in the course of his connection and association with such companies he had become familiar with the character of the risks which they undertook; that his understanding is that surety companies will not agree to guaranty the return of money,
122 but often guaranty the return of securities; that the defendant required applications for bonds or undertakings to be approved by Mr. Mark, Mr. Willis Parker and witness before the former, who was its agent, could exercise the power or authority to accept risks or issue bonds; that witness approved the application of Linderman for the bond in suit; that if he had known of the intention of Baglin and Linderman that these bonds were not to be returned, but that after the undertaking had been procured,
123 Baglin was to buy the bonds from a broker, turn them over to Linderman and that in a few minutes they would be sold, redeemed or turned into cash, out of which cash Baglin was to receive payment of an antecedent debt of $15,000 which Linderman owed him, and that Linderman was to receive the rest of the money, witness would not have approved the application, or considered it for a second; that he understood at that time, and for some years previous, that no company would make a guaranty for the repayment of money; that there was a difference in the moral obligation for the return of bonds and the return of cash, and that, in the case of hypothecation, as witness then understood and now understands, there is always quite a margin.

On cross-examination witness testified that he did not mean that a person borrowing securities was not expected to dispose of or use them; that surety companies in general would not as an abstract proposition write an obligation for the return of money, while they would write one for the return of securities; to the question whether it was his understanding that when securities are loaned they are going to be used, he answered "certainly"; that he could think of nothing that more nearly approximated money than United States Government bonds already due, and that for certain purposes the bonds were worth much more than money—that they could be used in connection with the starting of a national bank; that there
124 is not a great difference between a thousand dollar treasury note and a thousand dollar Government bond in the ultimate result, but you might be willing to pay more for one than the other for a certain purpose; that he knew a person borrowing securities would expect to make some use of them, and not merely hold them in order to return them when the time came; that he was never employed by the Southern Security Company, except that he is one of the attorneys of record for it in the trial of the present case; that there was a fidelity feature in the loaning of securities—that people would lend their friends securities when they would not lend them money.

On re-direct examination witness said that in testifying when securities were loaned he understood and expected the borrower would use them, he would not expect the borrower to sell them; that he saw the letter from George Parker to Willis Parker in connection with the application for the undertaking; that the letter stated that the alleged pool in which the copper stock was said to be deposited would terminate on the 25th of September; that he saw, also, the original application that was made to the Title Guaranty and Surety Company, and that these were probably the extent of his information on that point. And thereupon the defendant rested.

125 In rebuttal the plaintiff introduced as a witness CHARLES M. WILEY, the Chief of the Bond Division of the United States Treasury in New York City; EDWIN D. LEVINSON, bond broker, of New York City, through whom the United States bonds used in the transaction of July 17th and that of July 25th were purchased; FRANK C. MORRITZ, the messenger of the broker Levinson, who delivered the bonds to plaintiff at the Mercantile National Bank, and JOS. H. BENSON, a clerk of the broker Levinson, who, with Morritz, made entries of the serial numbers of the bonds, who all gave testimony tending to prove, and the fact was thereupon admitted by the counsel for the defendant, that the bonds sold by Levinson to Baglin on July 17th were not taken back to Levinson by the messenger nor repurchased by him, as testified to by Linderman, but were redeemed by the Mercantile National Bank through the Sub-Treasury at New York City, early on the following morning, for an amount corresponding to that for which Kein accounted to Linderman and Baglin by which Sub-Treasury the said bonds were forwarded to the Treasury at Washington, D. C., where they have ever since remained. The witness Levinson testified that he had repurchased the bonds which were used in the transaction of August 5th, 1907, but with which transaction it was further admitted the defendant in this case was not concerned.

The witness Morritz testified that he had not stated anything whatsoever about a loss consisting of the difference between the purchase price and the amount obtained on the re-sale of the bonds, nor had he said anything in reference thereto. The witness Levinson further testified that there was no commission charged upon the purchase of the bonds, but that they were sold at a flat price

126 The plaintiff then offered in evidence an indemnity agreement between Linderman and the defendant as follows:

Bond of Indemnity from —— —— to Southern Trust Company.

Home Office: Atoka, Indian Territory.

Southern
Trust
Company.

Know All Men by these Presents, That Garrett B. Linderman, of South Bethlehem, Pa. — held and firmly bound unto Southern

Trust Company, in the just and full sum of Forty-five thousand Dollars, to be paid to the said Southern Trust Company, its certain attorney, successors or assigns; to the payment whereof well and truly to be made and done We do bind our and each of our heirs, executors and adminstrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 10th day of July in the year nineteen Hundred and seven.

Whereas, The said Southern Trust Company has become or is about to become surety, at the request of the said Garrett B. Linderman on a certain bond in the sum of Forty-Five thousand Dollars, wherein Garrett B. Linderman and Company principal, conditioned for this bond is given to George Baglin, guaranteeing the return on or before Sept. 25, 1907 of the following securities: U. S. Government Old 4's in Lieu of United Copper stock, the property of G. B. Linderman & Deposited in pooling agreement.

Now the condition of the above obligation is such, that if the above bounden Garett B. Linderman h— executors or administrators, shall at all times hereafter save harmless and keep indemnified the said Southern Surety Company, its successors and assigns, against all suits, actions, debts, damages, costs, charges and expenses, including court costs and counsel fees at law or in equity, and against all loss and damage whatever, that shall or may at any time hereafter happen or accrue to the said Southern Surety Company, its successors or assigns, for or by reason of the suretyship of the said Southern Surety Company, as aforesaid, then this obligation to be void and of no effect, otherwise to be and remain in full force and virtue in law.

127

GARRETT B. LINDERMAN. [SEAL.]

Signed, sealed and delivered in the presence of
GEORGE H. PROCTOR.

(Reverse Side.)

Statement to Southern Trust Company.

Home Office: Atoka, Indian Territory.

By (*a*) Garrett B. Linderman who will indemnify said Company for becoming Surety for Gatrrett B. Linderman and Company.

1. State in full your name and principal place of business.

(*a*) Garrett B. Linderman, South Bethlehem, Pa.

2. State value and location of Real Estate owned by you and encumbrances thereon, if any.

(*a*) Residence at South Bethlehem, Pa. $155,000.

3. State amount of personal property owned by you, such as Stocks, Bonds, etc.

(*a*) One Million Six Hundred and Sixty-four Thousand dollars $1,664,000.

4. If in business, please state amount of your net interest therein, giving firm name and address and names of partners.

(*a*) Garrett B. Linderman and Company, South Bethlehem, Pa.
(*b*) Garrett B. Linderman " " "
128 (*c*) S. D. Kynor Pottsville, Pa.

5. References:

Name.	Occupation.	Address.
(*a*) Richard T. Green.	Lawyer.	43-Exchange Pl. N. Y.
T. M. Dodson.	Bankemehing Nat. Bk.	Bethlehem, Pa

— hereby declare that — have, in the replies above, stated the truth, without any mental reservation whatever.

Date July 10th 1907.

GARRETT B. LINDERMAN. [SEAL.]

129 Thereupon the plaintiff, further in rebuttal, testified that he did not return to Linderman the $15,000 note on the 17th day of July, but did so on the 26th day of July; that he did not give Linderman a check for $30,000 on July 17th; that he did not on that day after the messenger brought the bonds from the broker's office return them to the messenger; that Linderman was not charged any brokerage commission on the resale of these bonds; that the messenger did not say anything about a loss on the resale of these bonds; that he had never had any communication with George T. Parker prior to receiving the defendant's bond in suit, or anyone purporting to represent the Southern Surety Company, that at a stage of the transaction prior to the redemption of the bonds, at which he has testified there was some talk of hypothecating them, he offered no objection to that suggestion; that he did not tell Williams or Linderman on July 17th that they must redeem those bonds that afternoon; that he charged no interest on the note after July 17th, because the $45,000 in bonds was to have paid it in full, and it was not paid in full on that day because witness had failed to deliver the $45,000 of bonds; that he took Linderman's receipt for the full $45,000 on that date, as though he had delivered them, but did not give up the note; that on July 18th he received something over $13,000 and applied it on to the note, which amount he endorsed on it and advised Linderman that he had done so; that he thinks he retained the note pending the delivery of the balance of the bonds, which bonds he had to deliver to Linderman, and on cross examination he further testified as follows:

"Q. You have already testified that the only object in delivering the bonds was to hold the surety company? A. Yes; and under our agreement.

Q. You say that Mr. Linderman had some interest in the
130 delivery of these bonds—the part of the $45,000 which you failed to deliver. Did he?

Mr. EMERY: The same objection and exception.

A. Yes; under our agreement.

By Mr. DARLINGTON:

Q. What interest did he have in the delivery of the two thousand

dollars of bonds you had not delivered? A. I can't say that he had any monetary interest.

Q. Had he any interest of any kind? A. Why, yes.

Q. What was it? A. He was to receive from me two thousand and odd dollars of bonds.

Q. I am asking you what interest he had in receiving them. A. Under the terms of our agreement, he was to receive the bonds.

Q. I am asking you what interest he had in receiving them?

Mr. EMERY: It seems to me the witness has answered the question.

By Mr. DARLINGTON:

Q. Can you tell us? A. I don't know that he would have any interest. I was living up to our written agreement.

Q. And living up to it for the purpose of holding the surety company? A. That was the original agreement.

Q. Had Linderman any interest in charging the surety company?

Mr. EMERY: The same objection and exception.

A. Yes, sir.

131 By Mr. DARLINGTON:

Q. What interest had Linderman in doing this thing, so that the surety company would be liable to you? A. Linderman was to give me the surety company's bond.

Q. Had he done that? A. Yes.

Q. What interest did he have, on July 17, in your being able to hold the surety company? A. He had the interest that was expressed in that agreement between us, that I was to deliver him forty-five thousand dollars' worth of bonds, when, as a matter of fact, on the 17th, instead of delivering $45,000 worth, I only delivered $42,850 worth.

Q. You have told us several times that the remaining two thousand dollars was not to go to him. A. Yes, sir; it was to go to him.

Q. You mean the remaining $2,000? A. The bonds were to go to him.

Q. I am talking about the money. A. He was to repay me two thousand dollars.

Q. What interest, if any, did Linderman have in those bonds, after July 17? A. He had to receive the bonds from me.

Q. Simply to turn around and sell them, so that you would receive your money? A. Yes.

Q. What interest had he in them? A. To live up to the written contract.

Q. And to do that so as to hold the surety company? A. It was a conformity with the agreement.

Q. And for no other purpose but to hold the surety com-
132 pany. A. No, I don't think it was.

Q. Had Linderman any interest in holding the surety company? A. I presume he did. He was the one who secured the undertaking from the surety company.

Q. That would be an interest against holding it, would it not? He would not be liable on his indemnity, if it was not liable? A. That is a question I am not conversant with.

Q. You have given us as good an explanation as you can; have you? A. I think so.

Q. When, if ever, was there any agreement, arrangement or intention between you and Linderman that these bonds should be hypothecated? A. I think that subject was brought up. I am not positive whether it was previous to July 17 or on that date.

Q. I have not asked you when the subject was brought up. I asked you if there was ever any arrangement—— A. What do you mean by an arrangement?

Q. Any arrangement, agreement or intention between you and him that these bonds should be hypothecated. A. There was never any arrangement, either written or verbal——

Mr. BLAIR: Let him finish his answer, Mr. Darlington.

By Mr. DARLINGTON:

Q. Have you finished? A. No sir—just repeat that question.

Q. Do you wish to answer that? A. Yes—other than that there was a discussion as to how they should raise the money on these bonds.

133 Q. Was there any agreement that they should be hypothecated? A. There was not.

Q. Was there any intention between you and Linderman that they should be hypothecated, or was there simply a discussion and talk about it? A. Just a discussion.

134 The plaintiff further testified, in cross-examination, that he did not tell Williams or Linderman on July 17th that the bonds must be sold that day, but plaintiff was not willing to part with the bonds until he got his $15,000 or some arrangement was made whereby he would get the money to cover that note; that the arrangement that was made was their sale and redemption; that that is the way witness got his money, but he thought Linderman might be able to give him the $15,000 in cash; that he has testified that he followed Linderman into the cashier's room so that witness might get his money out of the sale of these bonds, and that he had no intention of giving up the bonds until that money was paid to him: and thereupon the plaintiff rested.

Thereupon, the foregoing being all the evidence in the case, the defendant moved the court to direct a verdict in its favor, on the ground that the bond was for the return of the securities on the 25th day of September, and that, by the written agreement between the plaintiff and Linderman of July 17th, the latter was given the opportunity and privilege of not returning them until the 26th day of September, making an extension of one day; upon the further ground that, under the undisputed evidence in the case, there was a preconcerted plan between the plaintiff, Linderman and others, knowing that the surety company would not give a bond for the absolute payment of money, to put the transaction into a form of bond

for the return of securities, and, when they had thereby obtained the bond, to cause, through the circuitous process of first buying the bonds and then selling or redeeming them, the undertaking to be converted into an obligation to guaranty the return of money; upon the further ground that Linderman and Baglin were both interested in carrying out their said plan, Linderman to get $60,000 of the $75,000 he was to receive from the discount, and the plaintiff to obtain payment of his overdue and unsecured $15,000 prom-
135 issory note, that the plaintiff, by his own admission, left to Linderman the obtaining of the bond, and aided him in obtaining it, and was thereby as responsible for all that Linderman did in procuring the bond, as if he himself had done it, and that he was, accordingly, equally with Linderman responsible for the representation upon which the undertaking was obtained, that Linderman owned a large amount of copper stock, which was pooled with Heinze; that the latter had agreed to lend him certain Government bonds until the pool was broken, which would be at the same time that the defendant's undertaking might fall due, that the copper stock would then be substituted for the Government bonds, and that the latter would then be released and returned: but the court, overruled the said motion, so made by the defendant, and denied the same, to which action of the court the defendant, by its counsel then and there duly excepted, which exception was allowed by the court and entered upon its minutes.

Thereupon the defendant prayed the court to grant the following instruction:

11. If the jury believe from the evidence that the plaintiff, as well as Linderman, was interested in the procurement of a surety company bond or undertaking; that the plaintiff was informed, and understood, that no surety company would give a bond if it knew it could be held under it for the payment of money absolutely; that a preconcerted scheme or plan was thereupon formed between them that the plaintiff should agree to buy Government bonds and lend them to Linderman, that the latter should obtain a bond from a surety company to cover the return of Government bonds, that, when such a bond was obtained, the plaintiff would purchase United States bonds to the amount of the undertaking and deliver them to Linderman, with the intention that he would redeem them to raise money, so that the plaintiff could be simultaneously paid the $15,000 and the remaining $30,000 be retained by Linderman, in the belief that, by this process, the surety company's obligation would be con-
verted into an absolute agreement to pay money, without the
136 surety company knowing that it was being made liable for the payment or return of money; that he left to Linderman the acts or steps necessary to obtain the surety company's undertaking, though assisting him to the extent of making the agreement, in advance, to buy the bonds and loan them to him, for the purpose of enabling him to get a bond from the surety company: that, when the defendant's undertaking had been thus obtained, and in pursuance of the said preconcerted plan or scheme, the plaintiff did buy United States bonds to the amount of the undertaking, delivered

them to Linderman, and aided, cooperated or acquiesced in the redemption thereof by him, and received payment of his said $15,000 debt from the proceeds, then the acts and representations by which the said Linderman, whether personally or through an agent, obtained the execution of the said undertaking by the defendant, are in contemplation of law the acts and representations of the plaintiff as well as of Linderman.

And, if the jury shall further find from the evidence that the representations by which the said Linderman so procured the execution by the defendant of the undertaking in suit were, in substance, that the said undertaking was being obtained for the purpose of guaranteeing the return of the United States bonds mentioned in it, in the following September, when certain alleged shares of copper stock belonging to Linderman and held in a pooling agreement would be released; that the surety company executed the said bond in reliance upon the said representations, that the same were false and fraudulent, and that the defendant would not have executed the undertaking if the real facts of the transaction, as above recited and known to the plaintiff, had been communicated to it, their verdict should be for the defendant.

But the court, under the objection of the plaintiff, rejected the said instruction, to which action of the court the defendant then and there excepted, which exception was allowed by the court and entered upon its minutes.

137 Thereupon the defendant prayed the court to grant the following instruction:

III. If the jury believe from the evidence that the plaintiff had been informed by Linderman that no surety company was willing to enter into an undertaking for the payment or return of money, and that it was impossible to obtain such an undertaking from a surety company; that he nevertheless accepted the undertaking in suit with the knowledge that it was the intention both upon his part and that of Linderman that the United States bonds which were to be delivered by him to Linderman should be redeemed, and with the belief that such redemption of them would convert the undertaking of the defendant which he so accepted into an undertaking for the return or payment of money, and that he accepted the said undertaking, delivered the said United States bonds to Linderman, and aided, co-operated or acquiesced in their being redeemed by the said Linderman, without disclosing to the defendant the said intention to redeem them, their verdict should be for the defendant, provided they shall further find that the defendant would not have executed its said undertaking if the said intention to cause the said bonds to be redeemed had been made known to it.

But the court, under the objection of the plaintiff, rejected the said instruction, to which action of the court the defendant then and there excepted, which exception was allowed by the court and entered upon its minutes.

Thereupon the defendant prayed the court to grant the following instruction:

IV. If the jury believe from the evidence that the execution by

the defendant of its undertaking in suit in this cause was obtained upon representations made to it by Linderman, either personally or through an agent, that its purpose was to guarantee
138 the return of United States bonds at the expiration, in September, of a pooling agreement, in which pooling agreement he had deposited a number of copper stock shares, and in reliance upon the said representations, whereas in fact he had no such copper shares in such pooling agreement, and the real intention was, and was known to the plaintiff to be, that the said United States bonds should be redeemed, in part to pay an antecedent debt due from Linderman to the plaintiff and in part for the pecuniary accommodation or advantage of Linderman; that the defendant would not have executed its said undertaking had it been apprized of the said intention; that the plaintiff, though informed that no surety company would execute an undertaking guaranteeing the payment of money or of a debt, and though believing that the effect of redeeming the said United States bonds would be to convert its undertaking into such a guaranty, if the jury believe that he was so informed and so believed, failed to cause the said real facts to be made known to defendant, or to make any inquiry as to the representations or means by which the execution of its said undertaking had been obtained, their verdict should be for the defendant.

But the court, under the objection of the plaintiff, rejected the said instruction, to which action of the court the defendant then and there excepted, which exception was allowed by the court and entered upon its minutes.

Thereupon the defendant prayed the court to grant the following instructions:

V. If the jury believe from the evidence that, after the undertaking in suit had been delivered to him, the plaintiff acquiesced, aided and co-operated in the act of Linderman in causing the United States Government bonds therein referred to to be sold or redeemed and thereby converted into money, with the effect of rendering
139 their return to the plaintiff impossible, that he did this in pursuance of a preconcerted plan or scheme between himself and the said Linderman, formed before the said undertaking was applied for or obtained, that the said bonds should be so converted after the said undertaking had been delivered, for the purpose of converting it, or the defendant's liability thereunder, into an absolute engagement for the return or payment of money, after having been informed that defendant would not knowingly give such an undertaking or enter into such an engagement, and that his object in the said transaction was thereby to create in legal effect a liability upon the defendant to him into which he knew it did not understand it was entering, and into which it would not willingly have entered, their verdict should be for the defendant.

But the court, under the objection of the plaintiff, rejected the said instruction, to which action of the court the defendant then and there excepted, which exception was allowed by the court and entered upon its minutes.

Thereupon the defendant prayed the court to grant the following instruction:

VI. If the jury believe from the evidence that the conversion of the defendant's guaranty that Linderman would return to the plaintiff the United States bonds described in it, into an obligation upon its part to pay to the plaintiff, in money, the par value of the bonds, with interest, was a material change, and that it was prejudicial to the defendant, and that plaintiff, without the knowledge or consent of the defendant, aided, co-operated and acquiesced in the sale or redemption by Linderman of the said Government bonds, by means of which the said change in liability, as the plaintiff contends, was created, their verdict should be for the defendant.

But the court, under the objection of the plaintiff, rejected the said instruction, to which action of the court the defendant
140 then and there excepted, which exception was allowed by the court, and entered upon its minutes.

Thereupon the plaintiff, by his counsel, moved the court to strike out all the testimony offered by the defendant and admitted by the court under the plaintiff's objection, and subject to its application to strike out, as set forth in the said bill of exceptions, with respect to the alleged fraud, misrepresentation and deception practiced upon the defendant to induce the execution and delivery by it of its undertaking in suit, on the ground that testimony of that character is inadmissible in defence of a suit at law upon a contract under seal, to which motion the defendant objected, but the court overruled the said objection and granted the said motion to strike out; to the granting of which motion the defendant then and there excepted, which exception was allowed by the court and entered upon its minutes.

Thereupon the plaintiff further moved the court to direct a verdict in his favor for the amount claimed in his declaration, to the granting of which motion the defendant then and there objected, but the court overruled the said objection and granted the said motion, to which action of the court the defendant then and there excepted, which exception was allowed by the court and duly entered upon its minutes.

Each of the exceptions taken by the defendant, as set forth in the foregoing bill of exceptions, was taken severally, and was duly entered by the court on its minutes at the time, and before the jury, under the direction of the court, as aforesaid, rendered its verdict.

And, because of the matters hereinbefore set forth are not matters of record, and because the defendant desires to have the same made of record, so that he may have his case and the rulings therein considered and heard on appeal to the Court of Appeals of the
141 District of Columbia, he requests the justice to sign and seal this, the defendant's bill of exceptions, and tenders to the justice presiding this, its bill of exceptions, praying that the same may be signed, sealed and made a part of the record, according to the statute in such case made and provided, which is accordingly done, now for then, this 21st day of June, 1910.

HARRY M. CLABAUGH,
Chief Justice.

142 *Directions to Clerk for Preparation of Transcript of Record.*

Filed June 28, 1910.

* * * * * * *

The Clerk of the Court will please include the following papers as the record for the appeal to the Court of Appeals, in the above entitled cause:

The Declaration, omitting Affidavit.

The Original Pleas, filed January, 1908, omitting copy of Bond and Affidavit.

Amended Pleas, filed June 17, 1909, omitting Copy of Bond and Affidavit.

Additional Plea, filed February 9, 1910.

Replications.

Bill of Exceptions.

Judgment and Notice of Appeal in Open Court.

Appeal Bond noted.

Extensions of time to file Transcript.

Designation of parts of record, for transcript.

J. J. DARLINGTON,
Attorney for Defendant.

The Clerk will please include in addition to the above designated papers the affidavits to the Declaration and to all Pleas; the demurrers and action of the Court thereon.

HENRY P. BLAIR,
Attorney for Plaintiff.

143 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 142, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 50002 at Law, wherein George Baglin is Plaintiff and Southern Surety Company, &c., is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 18th day of July, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2193. Southern Surety Company, a corporation, appellant, vs. George Baglin. Court of Appeals, District of Columbia. Filed Jul 18, 1910. Henry W. Hodges, clerk.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1910.

No. 2193.

SOUTHERN SURETY COMPANY, A CORPORATION,
APPELLANT,

against

GEORGE BAGLIN, APPELLEE.

BRIEF FOR APPELLEE.

DEAN EMERY,
HENRY P. BLAIR,
Counsel for Appellee.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1910.

No. 2193.

SOUTHERN SURETY COMPANY, A CORPORATION,
APPELLANT,

against

GEORGE BAGLIN, APPELLEE.

BRIEF FOR APPELLEE.

I. Statement.

This is an appeal by the Southern Surety Company, the defendant below, from a judgment in favor of George Baglin, the plaintiff below, for $45,000 and interest, entered February 17, 1910, upon a verdict directed by the court after a trial before Chief Justice Clabaugh.

The action is a suit at law brought by Baglin, the plaintiff, against the Southern Surety Company on its bond or undertaking, conditioned for the return to the plaintiff, on a given date, by one Garrett B. Linderman, of $45,000, par value of United States Government bonds known as "old

4's, due July 1, 1907, loaned to Linderman by the plaintiff.

Originally nine pleas were filed to the two counts of the plaintiff's declaration (pp. 5-7). After three of the pleas had been overruled and one withdrawn on demurrer (p. 10), the defendant, upwards of a year later, filed ten amended pleas (p. 10), and at the commencement of the trial was permitted to file an eleventh plea in addition (p. 17).

But as we understand it, all the defenses, including one vigorously urged to the effect that there never were, in fact, any bonds loaned to Linderman by the plaintiff, were abandoned except the two out of which the questions involved in this appeal arise. Those defenses are:

(*a*) That the plaintiff was guilty of some fraud or false representations in relation to the procuring of the bond in suit.

(*b*) That subsequent to the delivery of defendant's bond Baglin and Linderman modified the agreement between them as to the return of the Government bonds by the latter, and in particular agreed to an extension of one day's time.

Essential Facts Involved.

1. The plaintiff is the private secretary of one F. A. Heinze, who was in 1907 the president of the Mercantile National Bank in New York city (p. 21). At that time Mr. Heinze became acquainted with one Garrett B. Linderman, of South Bethlehem, Pennsylvania, a man of large means (pp. 52, 63), who was then vice-president and a director in the Lehigh Valley National Bank, of which he had been an officer for a number of years (p. 49).

In June, 1907, it was arranged that Linderman should

attempt to negotiate a loan of $200,000 from the Metropolitan Trust Company of New York on the strength of his own name plus collateral to be provided by Heinze. The latter's name was to appear on the note; but as the funds by agreement between the parties were to go in the first instance to him or his representative, and as all of the collateral, consisting of 6,700 shares of stock of the United Copper Company was to be supplied by him, he caused his private secretary Baglin, to become a joint maker with Linderman of the note to the Trust Company, and to enter into the agreements in the record and to carry out the transactions had pursuant thereto.

2. As will be seen from those agreements (pp. 26-28), it was contemplated, as previously stated, that the whole $200,000 was to go in the first instance to Baglin, which was not strange, since all the security for the loan was to be contributed by his principal. By the first written agreement between Baglin and Linderman, dated June 19, 1907 (p. 26), Linderman was to receive from Baglin after the money was obtained from the Trust Company, a loan of $75,000, repayable at the same time as the Trust Company loan, provided he could furnish a bond of the People's Surety Company guaranteeing repayment. Pending the securing of such an undertaking Baglin agreed to loan Linderman $15,000 on the latter's one-day note and undertook to advance the remaining $60,000 and cancel the note upon being supplied with the Surety Company undertaking for $75,000.

3. After the $15,000 had been loaned to Linderman he found difficulty in getting from the People's, or from certain other companies, to which he made application, a bond in the form of a guaranty to repay a cash loan (pp. 29, 30). It was, however, suggested that if the form of the transac-

tion were changed to a loan of securities instead of cash, a bond for their return could be obtained (p. 35).

Linderman had a severe impediment of speech, and in these dealings was usually accompanied by one Williams, who did most of the talking for him. Whether some of the surety companies, anxious to write such an undertaking for a man of Linderman's wealth and standing, suggested the change in the form of the transaction to Linderman or Williams, or whether the idea originated with either of the latter, does not appear. But it was reported to Baglin and to Heinze that although surety companies would not guarantee the return of a cash loan, they would guarantee the return of Government bonds (p. 30). The reason they declined to do the former was not disclosed to Baglin except that it seems to have been a case of "legal incapacity" (p. 30), or impossibility on the part of the companies. There is no testimony that he was ever led to believe they considered the risk different, or that it was more than a matter of form rather than substance.

4. Eventually Linderman supplied a list of surety companies, any one of which would write an undertaking for the return of Government bonds (p. 30). Thereupon the agreement of June 19 was modified by providing for the investment of the $75,000 in Government bonds, and the loan of them instead of cash, upon receipt of an undertaking for their return. Linderman agreed to pay any premium or commission involved in the purchase as well as to pay back the $15,000 previously loaned on his one-day note. The new agreement was dated July 17, 1907 (p. 27).

5. Presumably Linderman found it more convenient to receive the bonds to be loaned in two instalments, giving separate surety company undertakings in each instance—the first on July 17, 1907, for $45,000, written by the Southern Surety Company, being the bond in suit, and the second a week later, for $30,000, written by the Title Guar-

anty and Surety Company of Pennsylvania, not being involved here. There was also another loan by a representative of Heinze's in August, 1907, of $30,000 more of bonds of a different issue, whose return was guaranteed by a further undertaking of the Title, Guaranty and Surety Company. This transaction was wholly independent of Baglin or of the Metropolitan Trust Company loan or the agreements resulting therefrom. Those two undertakings gave rise to the Philadelphia cases of Baglin *vs.* Title, Guaranty & Surety Company and Klein *vs.* The Same, hereafter to be mentioned.

6. On July 17 Baglin was informed that Linderman had an undertaking—the one in suit—covering $45,000 of bonds. Thereupon an order was placed for their purchase, but as a matter of fact the broker was only able that day to secure $42,850 thereof. For these Baglin paid with Heinze's check, being supplied with the premium, etc., as agreed, by Linderman.

The closing of the transaction occurred in the Mercantile National Bank, those present being Baglin, Linderman, and Williams, together with Twombly, attorney for Linderman, and Emery, attorney for Baglin (p. 46).

At that time two papers printed in the record were prepared consisting of the agreement of July 17, modifying the previous agreement and providing for a loan of bonds instead of cash (p. 27), and of a memorandum reading as follows (p. 28):

> "The receipt by Mr. Garrett B. Linderman from Mr. George Baglin of $45,000 par value of United States Government bonds, known as old fours, pursuant to the agreement between the above-mentioned parties of June 19th, 1907, as supplemented and modified by the further agreements between the same parties dated July 17th, is hereby acknowledged and the receipt by Mr. Baglin from Mr. Linderman of an undertaking of the Southern Surety Company

for the return of said bonds pursuant to the aforementioned agreements is likewise acknowledged.

Mr. Baglin agrees that the remaining $30,000 par value of bonds of the said description which he has agreed to loan pursuant to the aforementioned agreements, will be procured and loaned by him to Mr. Linderman when Mr. Linderman provides a further undertaking from a satisfactory surety company for the return of said additional $30,000 of said bonds as provided in the agreement aforementioned.

Mr. Baglin also represents hereby to Mr. Linderman that it is his desire and intention at the time when said bonds would be returnable pursuant to the aforementioned agreements to accept from Mr. Linderman the face value of said bonds in cash with interest at (6%) six per cent in lieu of the return of the bonds themselves.

Dated July 17th, 1907.

GARRETT B. LINDERMAN.
GEO. BAGLIN."

Both of these papers were executed before the bonds were actually loaned or the undertaking in suit delivered, and after Linderman had advised Baglin that he had the undertaking and after the order for the purchase of the $45,000 of bonds had been given (p. 31).

It will be seen that this memorandum includes a representation by Baglin that at the expiration of the contract period he will accept the face value of the bonds in cash, with interest, instead of return of the bonds themselves. The reason for this last paragraph is stated by Emery, the plaintiff's attorney, in testimony given by him when called as a witness for the defendant (p. 46). The reason that the full $45,000 of bonds is receipted for is that when the memorandum was prepared and signed the bonds had not actually been received from the broker, and it was then supposed that the full amount ordered would be delivered (p. 46).

7. When the bonds were received they were counted by Baglin and turned over to Linderman, and the undertaking

of the defendant thereupon delivered to the former, and it was then arranged that the balance of the $45,000 of bonds which the broker had been unable to secure should be made good when Linderman was ready to receive the remaining $30,000 of bonds and give a further undertaking for their return (p. 24). This was done a week later, except for a shortage of $100 in the entire amount, due to a clerical error (p. 32).

8. The plaintiff testified categorically and without contradiction that he had absolutely no dealings with the Southern Surety Company whatsoever in reference to the issuance of the bond in suit; that he knew nothing as to the manner in which it was secured by Linderman, nor as to any representations made by the latter to secure it (p. 34); that he gave Linderman no assistance whatsoever as to securing a bond, nor was there ever any suggestion in his presence as to the method by which it should be secured, nor any discussion as to the dealings to be had with the company or its agents; and that he never heard afterwards anything as to what had been said or done, or as to what was claimed to have been said or done in the same connection (pp. 42, 43).

In addition to this was the deposition of Linderman, taken at the instance of the defendant, in which he also stated that he did not consult with plaintiff or Heinze, or their attorneys, about the application, nor refer to them in any way as to the details by which he was arranging to get the undertaking other than to inform them that he was trying to get one, but that the details were arranged entirely by himself (p. 50).

It further appeared from the deposition that one George T. Parker, of Philadelphia, through from Linderman secured the bond in suit, delivered it in New York to Linderman July 17, but did not go to the bank with Linderman (p. 50). Baglin also testified that there was no representative of the surety company present at the bank (p. 31).

Testimony of various representatives of the surety company also shows no communication between the company and the plaintiff, or opportunity therefor (pp. 51-59).

9. It was well understood by Baglin and Heinze that Linderman would probably want to raise money on these bonds. Baglin was of course interested to secure from Linderman repayment of the $15,000 one-day note, and he frankly testified that if (as was the case) Linderman did not take care of the note independently of the bonds he was prepared to insist that he utilize them to do so (p. 25). No insistence was necessary, however, as Linderman proceeded to do that, as will presently be shown. Previous to July 17 he had stated that he wanted to borrow on the bonds if he could get any one to lend on them close to their par value, and otherwise would redeem them at the Treasury. The matter of raising money on them was discussed several days before the actual transaction, and on the day of the loan the subject of an actual sale was brought up (pp. 22-25).

When the bonds were turned over to Linderman he and Williams, after some conversation between themselves, asked Baglin to introduce them to the cashier of the bank, and thereupon all three went to the desk of Klein, the cashier, and Linderman or Williams asked him to redeem the bonds, requesting him to advance $30,000 to Linderman that afternoon and to turn whatever balance was secured on redemption over to Baglin, the latter amount to be applied by Baglin to the $15,000 note (pp. 22, 45). And thereupon Klein did give to Linderman a cashier's check for $30,000, and the following day had the bonds surrendered to the Sub-Treasury, thereafter turning over to Baglin a check for $12,876.57, the exact balance derived from the redemption (p. 45).

When the balance of the $45,000 of bonds was delivered on July 25—together with $30,000 more, secured by the undertaking of another company—the same request was

made of Klein and the proceeds of the redemption from the excess over $30,000 was paid to Baglin to liquidate the balance of the $15,000 note (pp. 22, 45).

10. In advance of the trial the defendant took the deposition of Linderman, in which he asserted that on July 17 he received no bonds whatsoever from Baglin; that he saw some bonds, but did not know how many there were and never had them in his hands or possession, and that they were immediately returned to the broker's messenger to be sold, Baglin simply giving him a check for $30,000 and returning his note for $15,000 (p. 48). This was not only controverted by the testimony of Baglin and Klein previously referred to, but it was further shown by the plaintiff that these very bonds purchased July 17 were actually turned in at the Sub-Treasury by the Mercantile National Bank at the time alleged and for the precise amount to which Klein testified, and were forwarded to Washington for cancellation; and the depositions of the chief of the bond division of the New York Sub-Treasury, of the bond broker, of his messenger, and of his clerk were read to that effect. This was such a complete refutation of the story secured from Linderman that defendant's counsel thereupon admitted upon the record the truth of the facts testified to in the plaintiff's depositions above mentioned (p. 62).

11. Defendant's undertaking as delivered to plaintiff recited that Linderman had promised to return the securities borrowed by him "on or before September 25th, 1907," and the condition of the obligation was that Linderman should return the securities in question "on or before said 25th day of September, 1907" (p. 21).

Every other document in the case fixed September 26, which was also the time when the $200,000 note to the trust company was payable (pp. 26-28).

After the case had been at issue more than two years (pp.

5, 17), and more than a year after the Philadelphia cases, hereafter referred to, had been tried (p. 45), and at the beginning of the trial, an additional plea was filed alleging that after the delivery of the undertaking the agreement between Linderman and Baglin was modified and a new agreement made extending Linderman's time to return the bonds to September 26 (pp. 17, 18). That plea is discussed elsewhere.

12. On September 26 the parties and their counsel had an interview at the Mercantile National Bank at which a demand was made upon Linderman, who admitted his inability to comply therewith. Papers indicating what occurred at that time were thereupon prepared and signed, and at the same time notice was given to the Southern Surety Company of the default of its principal (pp. 39, 40, 47).

PROCEEDINGS IN THE TRIAL COURT.—Much of the record is taken up with an extensive cross-examination of Baglin and with testimony of other witnesses which was received over the objection of the plaintiff below, and subject to a motion to strike out. It was in support of the defendant's apparent principal defence, which was the alleged fraud of the plaintiff.

Baglin frankly stated that he had been told by Linderman and Williams that surety companies could not, or would not, or were legally incapable of guaranteeing in terms the repayment of a cash loan. His elaborate cross-examination was conducted in an endeavor to justify an inference that the defendant, in entering into an undertaking that Linderman return the bonds, was warranted in assuming that he would not dispose of them and that a legal duty was imposed on Baglin not to let him; that defendant was justifiably surprised that its secondary obligation was one which Linderman could satisfy by returning cash rather than bonds; that defendant did not know the measure of its own obligation in writing this undertaking in the respect referred to, and that Baglin ought not to look to it after having told Linderman

he might return cash instead of bonds—an optional right which the law gave him anyhow, while at the same time retaining the right of discharging his obligation by returning the bonds.

The further implication for which the defendant strove was that Baglin knew or ought to have presumed that the defendant was being in some way tricked, and was either uninformed or misinformed, and that he was in some way a party to whatever Linderman said or did, although what that was beyond the signing of an application and an indemnity agreement was not shown. In short, that Baglin was somehow party to some conspiracy or deception or fraudulent performance, or was chargeable actually or constructively, with responsibility for some fraud in securing this undertaking, and was, therefore, not entitled to recover.

In the effort to substantiate some of this the defendant called other witnesses who testified over objection and subject to a motion to strike out, and whose testimony was claimed to show that the company was, in fact, not fully informed, but was misled into writing a bond that it would not have written upon full information. This testimony came from various witnesses connected with the defendant company, the burden of which was that the company was unaware that Linderman expected to dispose of the bonds at once, and that he had signed an application stating that the government bonds were "in lieu of United Copper stock the property of G. B. Linderman, and deposited in a pooling agreement" (page 52)—whatever that meant—and that had they known the bonds were to have been sold they would have refused to write the undertaking.

The application was secured from Linderman by one George T. Parker, a surety company agent in Philadelphia, with an office in Washington (fols. 110-118), and was forwarded to the defendant through Parker's own son Willis Parker, one of defendant's witnesses, who was also in the surety company business in Washington, and was at that

time passing upon risks for the defendant under an arrangement with that company by which no bonds were to be written in Washington without his approval and that of two others. Willis Parker said that he prepared the application by condensing it from the application made to the Title, Guaranty & Surety Company and from a letter written to him by his father (pages 29, 30).

But not only was there not the slightest connection shown between Baglin and the defendant, but its witnesses carefully avoided the least reference even to what Linderman had said or omitted to say beyond the statement quoted above from his application. This omission is significant in view of the fact that Linderman did not balk at testifying in his deposition taken at the defendant's instance to facts which were finally admitted not to be so. The next link in the chain beyond Linderman would have been George T. Parker. Defendant neither called him as a witness nor endeavored to take his deposition; nor did they show any excuse for not calling him, although the trial lasted a number of days, but instead adduced vague hearsay testimony about statements in letters sent by him to his son, without producing either the letters or copies or pretending to connect those statements with Linderman, much less to connect them with the plaintiff.

All this will be more fully discussed later. At present we wish to note that all this testimony was objected to on the ground that in an action at law, particularly on a sealed instrument, the defense that it was secured by fraud was inadmissible, and that defendant's remedy, if it had been defrauded, is in equity in a suit to set aside or rescind.

On statements of defendant's counsel that the rule for which the plaintiff contended did not apply to this case (see the judge's opinion printed as an appendix hereto), the testimony was heard, but after argument had at the close of the trial the evidence thus given was stricken out (page 70).

The other defense of a variation or extension of the prin-

cipal agreement, being based on undisputed facts and writings, presented only a question of law, and when that defense was also disposed of adversely to the defendant it left no question to go to the jury, and the court therefore directed a verdict.

THE PHILADELPHIA CASES.—For use in cross-examination of Baglin, counsel for the defendant read various extracts from testimony given by him in two cases tried in the United States Circuit Court for the Eastern District of Pennsylvania before Judge McPherson, in the latter part of 1908.

As previously indicated, one of these cases arose out of the loan of the remaining $30,000 of U. S. 4's, which, together with the loan involved in this suit, made up the $75,000 of bonds specified in the agreements of the parties. That case is reported in 166 Fed. Rep., 356, where it will be seen that after a verdict had been directed for the plaintiff the case received further and most thorough consideration on a motion for judgment notwithstanding the verdict. An appeal was then taken to the Circuit Court of Appeals, where the judgment was affirmed in an opinion by Judge Gray, which is reported in 178 Fed. Rep., 682.

The other Philadelphia case arose out of a loan of Government bonds of another denomination made by Heinze through Klein, his agent. This loan was in no way connected with the Metropolitan Trust Company note or the agreements of Baglin and Linderman in evidence here. The two cases were, however, sufficiently analogous to permit the Title, Guaranty & Surety Company to urge the same defenses in each, with the additional defense of usury in the Klein case. It followed the same course as Baglin *vs.* Title, Guaranty & Surety Company with the same result, the opinions being reported in 166 Fed. Rep., 365, and 178 Fed. Rep., 689.

While in those cases there were certain defenses urged which are not relied on here, there were others which reappear in this case. Thus while the alleged fraud of the

plaintiff relative to the procuring of the undertaking was not asserted in just its present form, the defendant in those cases did assert that the plaintiff had been guilty of a breach of duty through non-disclosure of all the facts and circumstances to the Surety Company. That defense was, however, overruled by Judge McPherson, and his reasoning was so convincing that the point was but briefly considered by the Circuit Court of Appeals, being one of the matters which they said were "fully and satisfactorily covered by the opinion of the court below" (178 Fed. Rep., 689). The claim that Baglin's expressed willingness to accept repayment in cash instead of bonds was a modification of the principal contract which discharged the surety was also fully considered.

Although the discrepancy in date between the undertaking, reading September 25, and the other documents, reading September 26, existed in the Philadelphia case and appears plainly in the report thereof (166 Fed. Rep., 357-360), it was apparently considered either so trivial or so technical that it was not urged.

Position of the Appellee on This Appeal.—Our attitude here, briefly summarized, is as follows:

1. That all the testimony adduced in an effort to show that the bond in suit was secured through any fraud or false representaiton on the part of the plaintiff was inadmissible and was properly stricken out.

2. That there was a total failure on the part of the defendant to make Baglin accountable for any alleged lack of information, misapprehension or actual deception, particularly under long-established rules of sound policy to the effect that fraud is never to be presumed and is to be satisfactorily proven by the party asserting it.

3. That there was no modification or alteration of the contract guaranteed, either by an extension of Linderman's time or in any other manner.

4. That the judgment of the trial court was right and should be affirmed.

II. ARGUMENT.

POINT I.

The Defense of Fraud is Inadmissible in an Action At Law on a Sealed Instrument.

Reduced to its lowest terms, the claim of the defendant is that the defendant would not have written this undertaking had it known the bonds were to be redeemed and part of their proceeds used to pay the $15,000 note, and that plaintiff conspired with Linderman to have him conceal this fact and make false representations to a different effect to induce the writing of the undertaking.

So far as mere non-disclosure is concerned, there is ample authority, including the Philadelphia opinions, that it was no defense. (See Point III.)

As to the alleged fraud, it is not claimed that there was any deception at the moment of delivery, such as misreading or the substitution of one paper for another. The complaint is regarding the preliminary negotiations and the alleged representations on the faith of which it is said the bond was given, what is often known as fraud in the consideration.

On that point we submit that there is little to add to the opinion rendered by the trial court (Appendix A) beyond citing the authorities relied on there with some additions.

Besides the respect everywhere paid to decisions of the

United States Supreme Court, it is the court of last resort in this jurisdiction, and if it has held as we maintain we need go no further except for the satisfaction of showing that we assert no unique or exceptional principle, but one very commonly recognized where law and equity are recognized as distinct.

1. *The United States Supreme Court.*

The two principal cases are those referred to in the opinion of the trial judge.

In *Hartshorn vs. Day,* 19 How., 211, evidence was given in the trial court to prove that a certain agreement was procured by fraudulent representation, and it was held that the admission of the testimony was reversible error.

> "The general rule is that in an action upon a sealed instrument in a court of law failure of consideration or fraud in the consideration for the purpose of avoiding the obligation is not admissible as between parties and privies to the deed and, more especially, where there has been a part execution of the contract. The difficulties are in adjusting the rights and equities of the parties in a court of law; and hence in the States where the two systems of jurisprudence prevail of equity and common law, a court of law refuses to open the question of fraud in the consideration or in the transaction out of which the consideration arises in a suit upon the sealed instrument but turns the party over to a court of equity where the instrument can be set aside upon such terms as under all the circumstances may be equitable and just between the parties. A court of law cannot hold any middle course. The question is limited to the validity or invalidity of the deed.
>
> "Fraud in the execution of the instrument has always been admitted in a court of law, as where it has been misread or some other fraud or imposition has been practiced upon the party in procuring his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence. It is said that fraud vitiates all

> contracts and even records, which is doubtless true in a general sense, but it must be reached in some regular and authoritative mode and this may depend upon the forum in which it is presented and also upon the parties to the litigation. A record of judgment may be avoided for fraud, but not between the parties and privies in a court of law."

Twenty-four years later, in 1881, the Supreme Court decided the case of *George vs. Tate,* 102 U. S., 564. That case arose as does this, in an action upon a bond. The obligors claimed that they had been induced to execute the bond by fraudulent representations. The Supreme Court disposed of the possibility of this defense in an action at law very briefly as though the principle involved was well understood.

> "It is well settled that the only fraud permissible to be proved at law in these cases is fraud touching the execution of the instrument, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which the party did not intend to give. The remedy is by direct proceedings to avoid the instrument."

See also—

Lantry vs. Wallace, 182 U. S., 536, at 548, 550.

2. *The Federal Courts.*

Like the courts of this District, the Federal courts are created by act of Congress, and on their equity side form a complete and independent system of jurisprudence with the United States Supreme Court as the highest tribunal. The rule we contend for is well established in them.

Recovery was sought for the purchase price of land pursuant to a written contract. Fraud and deceit in obtaining the contract of purchase was alleged. The court refused to permit evidence thereof and the Circuit Court of Appeals approved of that ruling citing numerous authorities.

> "The only fraud permissible to be proved in law is fraud touching the execution of the instrument. This action was instituted at law for the purpose of recovering money due on contract. A court of law alone had jurisdiction. The distinction between legal and equitable defenses, whatever may be the rule in other jurisdictions, in the courts of the United States are always recognized and jealously guarded. They cannot be mixed. Equitable suits must be on the equity side of the docket and actions at law on the law side. No principle is better settled in these courts. Nor can this distinction or jurisdiction be waived by consent of parties, but can and should be enforced by the court of its own motion. * * * The court of law was without jurisdiction of an equitable defense and nothing the parties could do could endow it with jurisdiction. This is fundamental as to United States Courts."
>
> *Levi vs. Mathews,* 145 Fed. 152 (C. C. A., 4th Circuit).

The rule has been enforced in a number of cases where the defendant set up a release which plaintiff alleged had been obtained by fraud.

Pacific Mut. vs. Webb, 157 Fed., 155.
Hill vs. Northern Pacific, 104 Fed., 754.
Rogers vs. Chemical Co., 149 Fed., 1.
Chandler vs. Thompson, 30 Fed., at 43.
Kotzelnik vs. Iron Co., 91 Fed., 606.

And where fraudulent representations were alleged to have been made to a surety.

Wallace vs. Wilder, 13 Fed., 708, 715.

3. *Other jurisdictions.*

Citations might be multiplied indefinitely. We, therefore, refer to but a few, principally in New York.

One of the cases cited by the United States Supreme Court also arose in an action on a bond where the alleged fraudu-

lent representation was made by the obligee to the obligor as an inducement to executing the instrument. It was held to be no defense in an action at law.

Stevens vs. Judson, 4 Wend., 471.
Dorr vs. Munsell, 13 Johnson, 430.
Franchot vs. Leech, 5 Cowen, 506.
Osterhout vs. Shoemaker, 3 Hill, 513.
Belden vs. Davies, 2 Hall, 433.

Other cases to the same effect were cited in *Hartshorn vs. Day, supra,* from Virginia, Pennsylvania, Alabama, and Missouri.

POINT II.

There Was No Extension by Baglin of Linderman's Time to Return the Bonds.

This point has reference to the plea filed at the commencement of the trial (p. 17), and based upon the discrepancy between the date for the return of the bonds as stated in the undertaking and as stated in the various other papers.

The allegation of the plea is that there was an express agreement between Baglin and Linderman that Linderman would return the bonds on or before September 25, and that after making that agreement and after the making of the undertaking sued on plaintiff and Linderman, without defendant's consent, altered the agreement and

> "entered into a new, separate and distinct agreement upon valid consideration; * * * that the said Linderman should not be required to return the aforesaid Government bonds upon the 25th day of September, 1907, * * * and the said Linderman and the said Baglin contracted that the aforesaid Government bonds should be returned by the

> said Linderman at or before the later date, to wit, on the 26th day of September, 1907,"

and this extension of time was asserted to have discharged the defendant from its liability.

Before considering the authorities it will be well to review the facts, which are as follows:

1. The first agreement between the parties provided for a loan by the Trust Company repayable September 26 and a loan by Baglin to Linderman of $75,000 out of the Trust Company loan, likewise repayable on September 26 (p. 26). The next agreement dated July 17 provided for a loan of Government bonds, to be returned on the same day, September 26 (p. 27). July 17 was the day when the bonds were actually loaned, and on that day in a memorandum acknowledging the loan of the bonds it is expressly stated that the same have been loaned

> "pursuant to the agreement between the above-named parties of June 19th, 1907, as supplemented and modified by the further agreements between the same parties dated July 17th. * * * And the receipt by Mr. Baglin from Mr. Linderman of an undertaking of the Southern Surety Company for the return of said bonds *pursuant to the aforementioned agreements* is likewise acknowledged" (p. 28).

The undertaking itself was dated July 10 (fol. 41). In some fashion it happened that the date recited in it for the return of the bonds was September 25.

This undertaking was not delivered by Linderman to Baglin on July 17 until after the two agreements of that date (pp. 26-28) had been executed, and until the time of the actual transfer of the bonds, although it had been previously shown to plaintiff so that in ordering the purchase of the bonds and signing the papers on that day he knew that the defendant's undertaking had been executed and was ready for delivery (p. 31).

It thus appears that there are two separate answers to this technical claim:

First, that as a matter of fact, there never was any extension of Linderman's time granted to him subsequent to the delivery of the undertaking.

Second, that the recital by the surety company in the undertaking estopped it from claiming that the date for the return of the bonds was any other date than that thus recited, to wit, September 25.

As to the first proposition, it is submitted that we need do little more than point out that as Baglin never had any valid or binding agreement with Linderman requiring the return of the bonds on any date except September 26, and since it is nowhere claimed that the time to return them ever ran beyond the 26th day of September, there could not, in the nature of things, be any extension. For it seems elementary that in order to have an extension there must be two binding contracts between the parties; first, a contract maturing on September 25, and then a subsequent contract extending the old contract to September 26. So the first problem is to discover any agreement between Baglin and Linderman which fixed September 25. Until then it is hardly worth while to consider whether the parties ever extended the time beyond that day.

As to the second proposition, the rehearsal of the facts given above shows that the undertaking was not delivered to Baglin until after all the agreements and memoranda between him and Linderman had been signed.

It is well established that formal instruments are made operative only by delivery, and the date of such delivery is the controlling date. Such has been the holding of this court.

> "The true date of an instrument is that of its delivery and not the conventional date specified in the body of the deed. It is only by the act of delivery that a deed becomes effective, and it neces-

> sarily follows that a deed may always be declared on as of its true date regardless of the conventional date of execution."
>
> *Howgate vs. U. S.*, 3 App. D. C. at 292; affirmed sub. nom. *Moses vs. U. S.*, 166 U. S., 570.

There is nothing in the mere dates stated in a bond to preclude either party from showing the actual date of execution and delivery.

D. C. vs. Iron Works, 15 App. D. C., 210, at 218-19.
Brown vs. Ligon, 92 Fed., at 855.
Kenosha vs. McClellan, 21 Wis., 112.
U. S. vs. Le Baron, 19 How., 73.

In the light of the foregoing it is seen, therefore, that after all the agreements of every kind had been concluded between Linderman and Baglin an undertaking was delivered, thereupon first becoming an effective instrument, containing a mistaken recital as follows:

> "Whereas the said Linderman has promised that he will return to the said Baglin the aforementioned securities on or before September 25th, 1907" (fol. 41).

A recent case (1907), citing numerous other cases and text-books, arose over a guaranty for the faithful performance of a municipal contract. The bond recited that the contract had been executed on a certain date, whereas it had in fact been only authorized, and not actually executed at the time. It was held well settled that the recital estopped the defendant from availing himself of the technical objection as to date, and that allegations or recitals in a bond certain in their terms and relevant to the matter in hand are conclusive between the parties.

Reading Sewer Pipe Co. vs. Donnelly, 102 Minn., 192.

And where a bond recited that the risk had a license to sell liquor until February 28, the surety was estopped from showing that the license ran only to May 31 of the previous year.

Coleman vs. The People, 78 Ill. App., 210.

Sureties are estopped to deny the facts recited in their obligations, whether true or false.

Brockway vs. Petted, 79 Mich., 627, citing
U. S. vs. Bradley, 10 Peters, 365.
Pingrey on Suretyship, sec. 59.
1 *Brandt on Suretyship,* sec. 52.
2 *Brandt on Suretyship,* sec. 816.

By the execution of a bond and its return to the principal or his agent for delivery to the obligee a surety becomes estopped to set up any condition not known to that obligee upon which the surety's signature had been obtained.

U. S. vs. Boyd, 8 App. D. C., 440, 448.

Even where there was no such officer as the one mentioned, a recital in a bond that the person for whom security was given had been designated as such officer constituted an estoppel.

Rogers vs. U. S., 32 Fed., 890.

A bond recited that the surety company was the official depositary of county funds. Until the approval of the very bond in suit it was only conditionally appointed depositary, and it was held that it was unnecessary to prove the official designation as depositary since the recital estopped the company to deny it.

Board of Comm'rs vs. Trust Co., 75 Minn., at 493.
U. S., &c., Co. vs. McLaughlin, 119 Northwestern, 390.
Thompson vs. Rush, 92 N. W., 60.
Cordle vs. Burch, 10 Gratt., 480.
Weaver vs. Rhum, 47 S. W., 171.
Greengard vs. Fretz, 64 Minn., 10.

In *Brown vs. Ligon*, 92 Fed., 855, cited in the previous point, the bond recited the execution of a contract which had not then been made, and had other mistaken recitals, and it was held that the surety was estopped to deny the existence of the contract when the bond was given.

And in concluding this point it should be remembered that the burden is on the surety to show an express agreement for an extension, valid and binding, founded on a good consideration, definitely fixing the time.

Green vs. Lake, 13 D. C. (2 Mackey), 162.
Oberndorff vs. The Bank, 31 Md., 126.
Hayes vs. Wells, 34 Md., 512.
Clark vs. Gertsley, 26 App. D. C., 205, 208.

This is a matter where the court might well dispose of the pretense of an extension "on grounds of justice and common sense, and not upon mere technical quibbling by which it has sometimes happened that sureties have been held discharged."

U. S. G. Co. vs. Mathews, 89 Fed., 829.
Bank vs. Hyde, 131 Mass., 77.

POINT III.

Baglin was under no legal duty toward the Surety Company in respect to a disclosure of his transactions with Linderman.

The claim may be made that whether fraud was or could have been proven, yet Baglin owed to the Surety Company some duty of disclosure for neglect of which it may rely as a defense.

The first answer is that nothing of the sort is pleaded. This of itself should dispose of any such contention.

The defense of non-disclosure is, however, indicated in certain of the defendant's prayers (pp. 68, 69).

We might almost content ourselves with a citation of the Philadelphia cases. By reference to the opinions it will be seen that the defendant there claimed that Baglin should have disclosed his transactions with Linderman. The Reporter has summarized Judge McPherson's holding in that respect as follows:

> "Where a surety company executed a bond guaranteeing a borrower's return of certain bonds at a specified date, the fact that by a separate agreement the borrower was given option to pay cash instead of returning the bonds was not a material fact, the concealment of which from the surety released it from liability."
>
> *Baglin vs. Title, Guaranty & S. Co.,* ~~168~~ 166 Fed., 356, 362.

In the Circuit Court of Appeals Judge Gray wrote as follows:

> "The argument in support of this contention is that good faith required Baglin upon receiving the bond of the defendant delivered to him by Linderman to make full disclosure to it of all the facts in relation to the note transaction between Linderman and Heinze and the Metropolitan Trust Company, including the subsequent arrangement between them as to the division of the proceeds of that note.
>
> "The reasons already given for considering the bond in question independent of these transactions was sufficient to negative the contention that good faith imposed upon the plaintiff no duty to make any disclosure in the premises other than was made."
>
> *Title, Guaranty & S. Co. vs. Baglin,* 178 Fed., 682, 689.

The Supreme Court has held that an obligee is entitled where a bond is delivered containing appropriate recitals to suppose that before executing it the surety had informed itself of all it desired to know.

> 'He must not rest supine, close his eyes and fail to seek important information within his reach. * * *

> To render the general election of concealment sufficient in a pleading it is necessary also to aver that the creditor either procured the surety's signature, or was present when the instrument was executed, and then misrepresented or concealed essential facts which should have been disclosed. * * * The creditor is under no obligation, legal or moral, to search for the surety and warn him of the danger of the step he is about to take, and is not bound to inform the intended surety of matters affecting the credit of the debtor, or of any other circumstances unconnected with the transaction in which he is about to engage. * * * The plea does not set forth any of the circumstances attending the execution and delivery of the bond. It does not aver that there was any misrepresentation; anything fraudulent and kept back, or any opportunity to make disclosures on the part of the company, or any inquiry by the sureties before the bond was delivered; nor is it averred that the company was aware that the sureties were ignorant of the facts complained of. It is, perhaps, to be inferred * * * that the bond was sent by mail to the company in New York. If this were so, the company upon receiving it was under no obligation to make any communication to the sureties. The validity of the bond did not depend upon their doing so. The company had a right to presume that the sureties knew all that they desired to know, and were content to give the instrument without further information from any source. Under these circumstances it was too late after the breach occurred to set up this defense.
>
> *Magee vs. Manhattan Life,* 92 U. S., 93, 100.

In the neighboring jurisdiction of Maryland it has also been held that a creditor is not bound, in the absence of inquiries, to communicate facts that may affect an undertaking, and that the mere relation of principal and surety does not require a voluntary disclosure.

Wright vs. Brewing Co., 103 Md., 377.
Farmers Bank vs. Braden, 145 Pa., 473.
Abbott's Trial Ev., 512.

There is no duty imposed on an obligee to seek out a surety and see if he has been misled.

Western, &c., Ins. Co. vs. Clinton, 66 N. Y., 326.

It is always of assistance to see where the burden of proof lies, and especially so where the defendant produces no direct testimony, but insists that the court shall draw the inferences it desires. The rule is well established that bad faith is never to be presumed, and that in the absence of satisfactory evidence, there is a legal presumption of good faith.

Jones vs. Simpson, 116 U. S., 609.

Abbs. Trial Brief, 2d Ed., 366.

Even in ordinary insurance contracts where the plaintiff is the party who deals directly with the company, it has been held that an application is no evidence that additional facts were not communicated.

Ins. Co. vs. Folsom, 18 Wall., 252.

Such a defense as non-disclosure requires proof of actual misrepresentation in the face of inquiries by the surety, or evidence showing plaintiff was aware of the company's ignorance; and some opportunity for disclosure should be shown. Mere non-disclosure is not a defense, and the burden rests upon a surety operating for profit, and it should show that it reposed confidence in the obligee, and the latter permitted it to act under a material delusion. If a surety desires information on a particular matter, it is its duty to make direct inquiry.

27 Am. & Eng., 2d Ed., 444, 460, 461.

The non-disclosure complained of must be in one of the following respects:

(*a*) That Baglin expected Linderman to return cash instead of bonds and had so stated to Linderman in writing.

(*b*) That Linderman intended to sell or hypothecate the bonds.

(*c*) That Linderman was indebted, on his one-day note and was expected, if necessary, to use part of the bonds in raising money to pay that note.

Of each of these propositions in turn:

(*a*) As to the first proposition we have, as stated, nothing to add to the opinions in Philadelphia.

(*b*) We will not take time to argue the proposition that Baglin was under no duty to seek out the surety company to advise it that if bonds were loaned to Linderman he was likely to raise money on them by sale or pledge.

(*c*) The question of an antecedent indebtedness from the principal to the obligee has been frequently passed upon.

Some of the cases cited in *Magee vs. The Ins. Co., supra,* had to do with the question of existing indebtedness.

In *Hamilton vs. Watson,* 12 Cl. & F., 119, the bond was conditioned for the repayment of £750 to be loaned by a bank. The debtor was already indebted to the bank for more than that amount. After the bank had received the bond it permitted the debtor to draw for the £750, but the draft was immediately handed to the bank teller and none of it paid to the debtor, but merely credited against his debt. It was held that the surety was not discharged and if he required to know any particular matter, he should make it the subject of distinct inquiry.

And where a note was given to a bank with sureties to make good an overdraft, and was discounted for that purpose by the bank, the latter was held not bound to disclose the situation to the surety company.

Farmers Bank vs. Braden, 145 Pa., 473.
Doane vs. Fuller, 88 Ill. App., 515.
Comstock vs. Gage, 91 Ill., 328.

Even knowledge of actual insolvency need not be disclosed.

Roper vs. The Trustees, 91 Ill., 518.
Palatine Ins. Co. vs. Crittenden, 45 Pa., 555, and cases cited.

An interesting discussion in a case in the House of Lords only ten years ago, arose over this general question. A loan had been made to X, which had been guaranteed by H. The loan to X bore interest at 30%. A bond was written at Lloyds assuring that H would respond if necessary on his guaranty of the loan to X. It was insisted by the surety that the interest rate of 30% should have been disclosed. The Earl of Halsbury, L. C., in delivering the principal opinion, stated as follows:

> "Did they inquire by a single question what were the circumstances of the original loan? Not a word. What they did was what as business men and as sensible men would be the natural thing for them to do, they went and inquired at the bank and found out what the commercial reputation of H was; they were satisfied with the result of their inquiries, and they entered into this contract.
>
> "It is said now, after the liability has arisen, for which, as a matter of fact, the underwriters received payment (because it was a matter of payment), when they are called upon to pay it is said, 'we ought to have known the circumstances of the original loan, and if those were special circumstances of the original loan we ought to have had our minds directed to them, and then we would not have accepted such a transaction.' Of course, what people persuade themselves they would or would not have done when a liability has asisen is a thing with which one is sufficiently familiar in courts of law. If goods have gone up or down in the market, one has heard very strange evidence about what induced people not to take the goods, and in the same way, when it has turned out that this guaranty is to be sued upon, people convince themselves in a very odd way as to what would

have affected their minds if they had known it at the time."

Seaton vs. Burnand, L. R., 1900 App. Cas., 135.

In a recent work on surety companies (1909) the author states that since contract insurance bonds are always for the faithful performance of a contract between the risk and the insured, it is the insurer's duty to investigate and ascertain conditions, and it cannot be permitted to say that it was never informed.

Frost on Surety Companies (2d ed.), sec. 180, and cases cited.

POINT IV.

In a case of this kind the rule enforced in marine insurance and certain other forms of insurance does not apply.

In the court below numerous cases were cited to the effect that the relation between the parties was one of the utmost good faith and that a duty rested on the insured to voluntarily make the fullest possible disclosure of all the facts and circumstances within his knowledge, viz., the principle of *uberrimæ fidei.*

It has been held again and again that this rule does not apply to cases of principal and surety, but only obtains in reference to insurance on ships or lives.

Magee vs. Manhattan Life, 92 U. S., 93.

And non-disclosure, even if the facts are assumed to be material, will not vitiate a guaranty unless they were fraudulantly kept back.

North British Ins. Co. vs. Lloyds, 10 Exch., 523.

Although certain contracts, such as partnerships and marine insurance, are *uberrimæ fidei*, and require full disclosure, suretyship is not such a contract, and the rule that very little concealed that ought to have been disclosed, or stated that ought not to have been stated, does not apply to a compensated surety.

Davis vs. Ins. Co., 8 Chanc. Div., 469, 475.

Where the parties never came into communication it is not required that the creditor should seek out the surety and acquaint it with every circumstance affecting the credit of the debtor, or any matter unconnected with the transaction, and the rules of insurance do not apply to such cases.

Wythes vs. Labouchere, 3 De Gex & Jones, at 609.

> "Contracts of life and marine insurance stand on somewhat different grounds from other contracts, * * * but this rule is peculiar to such policies. I find no authority for extending it to other contracts, and there is authority to the contrary (quoting *North British Ins. Co. vs. Lloyds*). We think it is going too far to say that the creditor, in all cases and without being inquired of, is bound to communicate everything that it is important for the surety to know and that would increase his risk. Under such a rule no one would ever know when he could reply on a bond, and it would lead to a good deal of litigation."
>
> *American Credit Co. vs. Wimpfheimer,* 14 App. Div., 498.

One of the very cases cited by the defendant below limited this doctrine strictly to marine insurance, and even doubted whether it ought to be applied to fire and life insurance.

Penn Mutual vs. The Bank, 72 Fed., at 434 to 442.

POINT V.

There Was no Fraud Proven.

In the abstract, a discussion of this point is perhaps not relevant, since if the evidence stricken out was inadmissible it may properly be considered as never having been in the case at all, and therefore as not calling for any comment.

The fact is, however, that it is in the case, and the plaintiff below ought not to be left here resting under the burden of any imputations of fraud where, as in this case, the evidence finally expunged falls completely short of justifying any such accusations.

The insufficiency of this evidence is emphasized by remembering the uniform rule as to proof of fraud. We know of nothing where the requirements as to proof are more exacting—and more justly so. Nothing is easier than to indulge in assertions and innuendos of fraudulent conduct without any basis in the proven facts. The requirements of proof in such cases begin with the very pleadings which, in actions alleging fraud, are demurrable unless they set out facts to constitute fraud.

And when it comes to the weight and sufficiency of evidence the same principle is carried out in the rule that fraud is never to be presumed, but must be clearly proven by the party alleging it. This court has often placed itself squarely on record to that effect.

Security Co. vs. Garrett, 3 App. D. C., 59.
Warner vs. Jackson, 7 App. D. C., 211.
Jackson vs. Clifford, 5 App. D. C., 312.

Suspicious circumstances are not the equivalent of proof, and unless all the facts and circumstances taken together are strong enough to generate a clear rational conviction of fraud, that conclusion ought not to be adopted which will destroy apparent good title and blacken the character of the

parties concerned; and where an honest and legitimate purpose may be presumed equally with a corrupt and fraudulent one, the former is to be preferred.

McDaniel vs. Parish, 4 App. D. C., 213.

Even in the absence of any such rule we should still be prepared to ask where on a dispassionate examination of this case any proof of fraud on the part of the plaintiff is found. If it exists, it must be either in Baglin's cross-examination or in the testimony of the defendant's witnesses.

As to Baglin's testimony, after the repeated insistance of counsel that the witness should commit himself to certain propositions which were persistently put forward in ever-changing form, all that was finally obtained was substantially the following:

(*a*) That Baglin knew that certain surety companies had declined on the grounds of legal incapacity or otherwise to guarantee repayment of a cash loan.

(*b*) That he knew Linderman expected to dispose of the bonds by sale or hypothecation.

(*c*) That he was entirely ready to permit Linderman to return a cash equivalent instead of the bonds.

(*d*) That he did not attempt to prevent him from disposing of the bonds, and to the extent of introducing him to Klein may have been said to have facilitated him.

(*e*) That he was looking to have his $15,000 note paid, and would have insisted, if necessary, on having Linderman use enough of the bonds to take care of it—although as a matter of fact Linderman did so voluntarily.

Granted that Baglin knew that certain companies had declined to guarantee a cash loan, there is nothing to indicate that it presented itself to him as anything more than a matter of form.

Linderman's own testimony is to the effect that the People's company did not care to go on a cash bond, and that Williams suggested that perhaps "*the* surety company"

would write a bond covering securities; that is, that the same company to whom the application in reference to the cash loan had been made would do the business if it were a loan of bonds (p. 49). This would have led any one to suppose that the change of form was not only known by and acceptable to the surety company, but had likely enough been suggested by it. So if inferences of good faith are to be preferred to those of bad faith what is there in this to cause one to suppose that Baglin looked upon this change as one involving an increased risk to the surety?

The defendant's own witnesses admitted that they could think of nothing more nearly approaching cash than a Government bond then being redememd, and the refinements indulged in as to the greater moral obligation or fidelity feature (p. 61), resulting from a loan of securities were scarcely likely to have crossed Baglin's mind or that of any one else.

Baglin, of course, thought that it was all practically the same thing (p. 30). If he gave credit to the surety company's agents for ordinary intelligence, he would suppose that they would know that a past due Government bond could only be availed of without loss through sale or redemption. Anything else meant an actual money loss every day. If Linderman had hypothecated $75,000 of past due Government bonds to secure a loan at 4 per cent for three months, he would have paid $750 interest on his loan, which would have been a total loss, for his 4 per cent collaterals, being past due, would be earning no interest whatsoever during that period.

And all the questions and answers about the company not knowing that it would be held for the payment of the money were but a poor compliment to the company's representative. That was the very form which the question took again and again—whether a company would give a bond "if it knew it was going to be held for the payment of the money absolutely"; "a bond to pay cash without the company knowing they were giving that kind of an obligation" (pp. 29, 30).

When a question such as the following manifests confusion in the mind of counsel, it is not strange that it communicates some of that confusion to the mind of the witness:

> "Q. And to put that" (that is the transaction) "in such form that the surety company would give the security without knowing it was liable for the money? A. That is correct." (P. 34.)

Taking the entire testimony of the witness, and not a selected phrase or two, it is clear enough that he understood that counsel was coming back to the old proposition on which the changes had been rung, *i. e.*, that the surety company was giving security without making itself liable—that is in form—for the return by Linderman of money.

It is only a half dozen lines lower down that both counsel and witness indicate this to be their understanding as follows:

> "Q. I believe you told us yesterday that you knew the surety company would not give a bond if it knew the transaction was one that would make it liable for payment of money. A. I was so informed by Mr. Linderman." (P. 34.)

And what he had been informed by Mr. Linderman, as he testified again and again, was that the surety companies would not write a bond guaranteeing the return by Linderman of a cash loan.

As this is their own version, we may well leave it there. The only other one would imply that counsel meant that his company gave its bond without knowing it became liable to pay money on breach of the condition. If it did not know that, it did not know the most elementary principles of its legal obligations.

If it means that the company did not know that it was to become liable for the return of the money which Linderman raised on the bonds, the answer is that it never did become liable for its return, since Linderman himself was under no

obligation to return it, and could fulfill his contract completely by the return of either that amount of money or that quantity of bonds at his exclusive option. This was fully pointed out by Judge McPherson (166 Fed. Rep., 361, 362).

If it means that the company would have been unwilling to pay cash on Linderman's default if it knew that Linderman was going to turn the bonds into cash, then it was endeavoring to limit Linderman's legal rights in a way not attempted in the contract guaranteed, and also in a way which the company itself did not ask of Linderman when it wrote the undertaking.

What we suppose counsel and witness both meant was that certain companies were unwilling to give a bond making themselves liable for Linderman's default if, having been loaned money, he failed to repay the money. That was admitted to be the case again and again.

But if counsel persistently put his questions in a form so odd and so far from clear that they require minute analysis to be made plain, he has little excuse for trying to make much of the answers of the witness.

No matter how the thing is twisted and turned, the fact remains that the company made no effort to get Linderman even to represent whether he was going to retain the bonds—still less to agree to it.

Look, for instance, at the application which is the only approach to a concrete thing on the point in the record.

To be sure, this application was never connected with Baglin—and hardly with Linderman himself. The latter simply testified that he "presumes he signed a written application and * * * thinks he signed some sort of an indemnity agreement and a statement purporting to show his financial condition" (fol. 102); but the defendant was careful to ask him nothing about it, and George Parker, the man who secured these papers from him, never appeared, and the application was lugged in by the heels by Willis Parker as a

thing he received from his father in an unproduced letter (fols. 105, 114).

But suppose it had been duly proven and was being used against Linderman instead of the plaintiff. If the importance of not disposing of the bonds was such a serious matter as is now pretended, why not have gotten Linderman to state in his application that it was not to be done? The two Parkers between them—experts in the business—prepared this paper, and got something so vague that it is unintelligible. The two lines relied on are the following:

> "U. S. Government Old 4's, in lieu of United Copper stock, the property of G. B. Linderman, and deposited in pooling agreement" (page 52).

Was it left hazy and unobtrusive so that Linderman should not notice it particularly, and let it go as it was—something he would not especially remark, and yet which the agents personally interested in getting the bond written and approved could represent to the company as meaning anything they pleased, and the company in its turn use as a defense if ever sued?

Linderman could scarcely have read it carefully, or he would have noted the mistaken date a line above and again a line below. He was not likely at that time to have forgotten the due date of his $200,000 note to the Metropolitan Trust Company or of his agreement with Baglin.

The only representations in these words are two, viz., that Linderman owns some United Copper stock, and that it is deposited somewhere under a pooling agreement. He does not represent how much he owns—whether common or preferred,—whether it is free and clear, or pledged—standing in his name or otherwise; while as to the pool there is no intimation of where the stock is deposited, the terms of the pool or any details whatsoever, nor the barest hint that Baglin knew of any pool or was interested in it.

For aught Baglin knew at the time, so far as the record shows, both of these representations might have been true.

And there is not a suggestion in the application, even remotely implied, that Linderman was not going to dispose of the bonds. If this was a life insurance case, where the statements in the application were in terms made warranties on which the policy was issued, and Linderman were plaintiff, and the only breach urged against him was that he had disposed of the bonds, we submit that any such defense would verge on the frivolous, especially where the very answers in the application were phrased by the agent of the insurance company (p. 55).

And Baglin, had he seen the application, would have had no reason to suppose from its language that Linderman was expected by the surety company to hold on to the bonds.

Suppose the bonds *were* "in lieu of copper stock, the property of Linderman," and suppose the copper stock *was* in a pool, is that any reason why Linderman should not want to dispose of the bonds? The most that can be inferred from the application is that whatever Linderman would have done with the copper stock had it not been in a pool, he would do with the bonds which he was borrowing in lieu thereof.

And where is the basis, not merely for assuming, but for asserting positively, that if Linderman had been in possession of the copper stock, he would not have hypothecated it, or, if he chose, have sold it?

When we go a step further and ask how Baglin is to be found guilty of fraud on any direct and satisfactory testimony the situation verges on the ridiculous. The principal reliance is based on what Willis Parker claims was written to him by his father, but that comes no nearer to Baglin than four removes, being what Willis Parker said was written in this unproduced letter as having been told to George Parker by Linderman. Linderman doesn't say he told him so; George Parker doesn't say so; the letter isn't exhibited to say so; the application to the other surety company is not

produced to say so; *but if all of them said so, where is the link to connect the chain with Baglin?*

But the defendant asserts that the jury might have inferred this connection. If they had it would have been:

(1) In the face of the uncontradicted testimony of Baglin that he had no arrangement or understanding with Linderman, or anyone on his behalf, and no knowledge of any kind as to what he did to get the bond.

> "I didn't have any idea how he would get it. I don't know today how he got it" (p. 34).

(2) In the face of the uncontradicted testimony of Linderman—

> "that he did not consult with Kellogg, Beckwith, Emery, Heinze or Baglin about those details; about the applications, premiums, &c.; that he informed them that he was trying to get an undertaking, but did not refer to the progress with which he was arranging the details by which he should get the surety, and that this was done entirely by himself" (p. 50).

(3) In the absence of anything in the surrounding circumstances sufficient to justify an assumption of fraud—if fraud can ever be *assumed*.

Nor, we submit, would the existence of the unpaid $15,000 note have begun to justify a jury in inferring fraudulent participation by Baglin in securing the undertaking.

Linderman was a millionaire and vice-president of a National bank, who had standing enough at a large New York trust company to raise $200,000 on 6,700 shares of mining stock, and he was able to supply "a *list* of surety companies" (p. 30) ready to go on his undertaking.

If the Southern Surety Company, on the strength of ratings from Dun and Bradstreet, was willing to write a $45,000 undertaking, to run ten weeks without security, is there any reason to suppose that the plaintiff should have been worried over a $15,000 note due forthwith?

Of course, he was glad to have it secured. Any business man would welcome security on the obligations of men of most unquestioned financial standing, but the existence of this note unsecured was a poor reason to induce Baglin to increase Linderman's obligation to $75,000 by participating in any scheme which would invalidate the security he was to receive for this five-fold greater sum.

The existence of this unsecured antecedent debt is so far from justifying the inferences of fraud that there are many cases to the effect that the obligee need not even disclose the existence of such a debt to the obligor when he expects to apply the *entire* proceeds for which security is given to payment of such debt.

Finally, why is the defendant so fearful of pursuing his equitable remedy for rescission and cancellation? Is it that he was hopeful of creating a doubt or suspicion in the minds of jurors by presumption and strained inferences when he realizes that the cold facts themselves when presented to a trained and experienced chancery judge and subjected to analysis would leave him little hope of a favorable determination?

This is a case which well illustrates the sound policy of the rule that refers questions of this kind to a court of equity, where such transactions can be more satisfactorily dealt with.

POINT VI.

The modern doctrine as to compensated sureties distinguishes between them and the old class of individual sureties, acting out of motives of friendship and without remuneration.

The best statement seen indicating the changed attitude of the courts toward surety companies is found in an opinion by the Circuit Court of Appeals for the Fourth Circuit as follows:

> "Fully recognizing the rule of *strictissimi juris* as applying to contracts growing out of the ordinary relation of creditor and simple surety, we cannot and do not recognize this rule as applying to contracts underwritten by these bonding corporations whose business it is (and a profitable one, too, it would seem, from the number organized and existing), to insure, for a monetary consideration, the obligee against a failure of performance on the part of the principal obligor. In such cases, before such bonding company can be released, it must show that the changes made in a contract like this, guaranteed by it, operated injuriously to affect its rights and liabilities. * * * The very reason for the existence of this kind of corporations, and the strongest argument put forward by them for patronage, is that the embarrassment and hardship growing out of individual suretyship that give application for this rule is by them taken away; that it is their business to take risks and expect losses. If, with their superior means and facilities, they are to be permitted to take the risks, but avoid the losses by the rule of *strictissimi juris,* we may expect the courts to be constantly engaged in hearing their technical objections to contracts prepared by themselves. It is right, therefore, to say to them that they must show injury done to them be-

fore they can ask to be relieved from contracts which they clamor to execute."

Atlantic Tr. Co. *vs.* Laurinburg, 163 Fed., 695.
Baglin *vs.* Surety Co., 166 Fed., 356.
Guaranty Co. *vs.* Pressed Brick Co., 191 U. S., 416, 426.
Hill *vs.* Am. S. Co., 200 U. S., 197, 202.
Frost on Suretyship, 2d ed., sec. 179.

And these contracts are construed like insurance policies, against the insurer.

American Surety Co. *vs.* Pauly, 170 U. S., 133, 144.
Tebbets *vs.* Guaranty Co., 73 Fed., 95, and cases cited.

It is submitted that on the entire record the judgment of the court below was correct and should be here affirmed.

DEAN EMERY,
HENRY P. BLAIR,
Counsel for Appellee.

pinion of Mr. Chief Justice Clabaugh.

The COURT: Gentlemen, this case has consumed considerable time, for which I suppose the court is partly responsible. Owing to its importance, and also to the fact that there were so many questions involved, I allowed much evidence to go in subject to exception. But the decision of one question involves the determination of the others, and all I shall have to decide concerning this evidence is whether it is proper to be submitted to the jury at all.

I should be unfair to myself if I failed to acknowledge the great industry and, it seems to me, the unusual ability with which this case has been presented. It is certainly not due to counsel if the court shall be in error as to its findings.

Without going over all the facts of the case, because they are so perfectly familiar to counsel, this is a suit in which the cause of action is a bond given to indemnify the obligee, Baglin, for the loan of some $45,000 of Government bonds to Linderman. Its inception was an effort on the part of Linderman to borrow from Baglin the same amount of money, to be secured by a surety bond. When that effort was made, they were informed that a surety company could not be found which would go upon a bond providing simply for the return of money in the way of a loan. They would not guarantee any such loan.

Then it was suggested that Baglin, the plaintiff, should loan to Linderman $45,000 of Government bonds. This was some time in the middle of July, the bonds having been called in or having matured the first of July previous, and therefore they were being redeemed.

This scheme or suggestion to loan the bonds was based upon the theory that the surety company would guarantee the return of bonds, but would not guarantee the return of a loan of money.

Baglin did not own the bonds, but had to go into the market and buy them for the purpose of loaning to Linderman. It is manifest to my mind from the testimony that Baglin was quite aware of the condition under which the surety company refused to give a bond for the loan of money. Therefore when this new suggestion was made, it was made

with the full understanding of Baglin that the surety company would not give a bond for the return of money loaned, but that they would for the return of bonds.

The evidence went on to show that there was a certain agreement made, under which the parties were to get these bonds, and it is quite clear that almost contemporaneously with the passing of the bonds from the plaintiff to Linderman, there was also a dependent agreement that out of the proceeds of these bonds there should be paid to Baglin, the plaintiff, the sum of $15,000 for a note of Linderman which he, Baglin, held without any security whatever; so that out of the $45,000 involved in this particular case, $15,000 was to be given back to Baglin for the purpose of paying this unsecured note. So we have simply a refusal of the surety company to give a bond for the payment of money, and the fact that in lieu of that Baglin and Linderman undertook to use Government bonds which had then matured, for the purpose of getting the security of this defendant company, substituting one thing for the other. Then, when the bond was obtained, almost contemporaneously with the reception of the Government bonds by Linderman, they were handed over to the cashier and he paid the money for the bonds, and had them redeemed by the Government the next day.

Incident to that there were several agreements on the part of Linderman and Baglin, with which counsel are very familiar, and I need not go into their contents. All but the last one, which is called a receipt, were made prior to the date of the delivery of the bonds. Those agreements pointed to the 26th of September as the day upon which the bonds were to be returned. The surety company's bond called for the return on the 25th. Subsequent to that, a few hours afterward, there was a receipt, or whatever it may be called, given by Linderman to Baglin. In fact, it is signed by both, so it is hard to tell what it was; but in this Mr. Baglin represents to Mr. Linderman that it is his desire and intention at the time the said bonds would be returnable, pursuant to the aforementioned agreement, to accept from Mr. Linderman the face value of said bonds in cash, with interest at 6 per cent, in lieu of the return of the bonds.

The evidence that was taken subject to exception showed, among other things, that the application for the bond in this case stated in substance that these United States bonds were required, and the surety company was asked to guarantee

the return of them, upon the theory that there was some pooling arrangement, under which Linderman had in this pool a large number of shares of copper stock, and that the pool was to be dissolved at about the time of the return of these bonds, or perhaps at an earlier date, and that he wanted these bonds to be used in lieu of the copper stock which he wanted to withdraw from that pool. The testimony further shows that it was upon this theory that the surety company guaranteed the return of the bonds, the surety company also taking from Linderman an indemnity bond to insure the safe return of the bonds by him; it also being shown that Linderman had assets of nearly $2,000,000 over and above his indebtedness, according to the statements made by Linderman to the surety company.

That is practically the case as it stands.

Now, there are two main defenses that are relied upon. There are a great many more questions involved, but it seems to me that the decision of these two main questions will relieve the court of any question in respect to other issues that were raised in the case.

The first point made by the defendant is that there was an extension of time which renders the bond of the defendant void. Now, I do not think that defense is good. The theory of *strictissimi juris* has been urged in this case. In the first place, I do not think there has been any extension of time. While nobody has said so, the inference is perfectly plain to my mind that the 25th, called for in the contract, was evidently and plainly to my mind a mistake. It was never intended to be the 25th. It was intended to be the 26th. Be that as it may, if the contention of counsel for the defendant be true that the bond was discharged by reason of this prior agreement, then I think the reply to that is sound, that if the bond did intend the 25th, as it certainly shows on its face, whilst the contract had been the 26th, it seems to me that if that were so, then we would have the position of the contract that had been made previously being abrogated by the acceptance of the delivery of the bond, and therefore controlled by the date in the bond.

It is urged also that Mr. Baglin represented to Mr. Linderman that it was his intention at the time when said bonds would be returnable, pursuant to the aforementioned agreement, to accept from Mr. Linderman the face value of said bonds, with interest at six per cent, in lieu of the return of

the bonds. I do not see how that affects the liability of the defendant company. If he took the cash, that was all that could possibly be urged by the defendant company; because the company were liable for the cash if the bonds were not returned, and the mere fact that he says that he hereby represents to Mr. Linderman that it is his desire and intention at the time said bonds would be returnable pursuant to the aforementioned agreement to accept cash, is by no means a contract on the part of Mr. Linderman that he will give the cash instead of the bonds; but it is a mere expression on the part of Mr. Baglin, the plaintiff, that he would accept cash in lieu of the bonds. If he had accepted the cash, the surety company would not have been injured by it; nor do I see how it affects in any way the bond in question.

Then, I do not think, gentlemen, that the principle of *strictissimi juris* applies to one of these surety companies. I do not see how it would affect the case one way or the other if it did, but whilst there has been no decision on the subject, and whilst the United States Supreme Court has distinctly declined to decide it the only time it has been before it, still it does seem to me that there is a great deal of force in the argument that the fact that these companies are organized for the very purpose of doing this character of work and are paid for it, modifies the whole theory of principal and surety as it has been heretofore regarded, as a matter of friendliness, without any particular consideration.

When we have a company the purposes of which are entirely dependent upon the payment of premiums, and the hazards to which they are subjected control the amount of the premiums paid to them, it seems to me that these companies ought to be put upon the basis of insurance companies. When a company undertakes to insure the fidelity of a servant or employee, or the faithfulness of the act of somebody, as in this case, in guaranteeing the return of property, I do not see why it is not as much an insurance as the insurance of a house, or a life, or anything else. I am only suggesting this by way of reply to the argument, because I do not really think that the question is essential to be decided here; and in view of the fact that the Supreme Court may tomorrow decide in exactly the opposite way, perhaps as a matter of wise discretion it would be better not to say anything about it; but I do not think that this con-

tract has been modified in a way sufficient to release the liability of the defendant company.

But the real point in the case, in my judgment, is the simple question in an action at law whether, upon a sealed instrument of guaranty for the faithful return of these bonds or their equivalent (because if they returned the equivalent it would be the same thng as if they returned the bonds), you can show that the bond was procured by fraud. That is a plain statement of the case. Can you, in an action at law, upon a sealed instrument, show that that bond was secured by even the most egregious fraud?

That is the question that has given me the most trouble. Up to the trial of this case, I had no doubt that it could be done. I did not know there was any doubt about it; and when counsel stated that they had authorities to support their contention, the court was frank enough to say that if they could furnish one such authority it was all the court required upon the subject; and I will say that they furnished it; and when the subject was broached in the early part of the trial of this case, it was announced by counsel on the other side, for the defendant, as I understood it, that they conceded that to be the law, but that there had been decisions of the Supreme Court of the United States which differentiated a case of this kind from that of a surety case, by reason of the fiduciary relation that was involved. And as the court is always impressed with counsel's statements of the law, or any statement of fact, it was largely upon that statement that this case was permitted to take the course it did. The court has not the slightest doubt that that statement of counsel was made in good faith and is still persisted in. The question is, has counsel shown that difference? I may say, in passing, that in the cases involving this proposition that I have tried in my own State, of which there have been quite a few, there never has been any question about it, and perhaps I was misled by that fact. The only question is, Can it be differentiated now from other cases?

The case of George *vs.* Tait, with which counsel are so familiar, in 102 U. S., was an action on a bond; and whilst I cannot see that the fraud that was practiced upon the principal made any difference or affected the surety, still it was on a surety's undertaking. Now, the court in that case say:

"It is well settled that the only fraud permissible to be

proved at law in these cases is fraud touching the execution of the instrument, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some trick or device an instrument which the party did not intend to give."

Now, the case upon which that was based is the case of Hartshorn *vs.* Day, in 19 Howard, page 211. If this were not a case decided by the Supreme Court of the United States, I would almost have the courage to say that the reasons were not very impressive to me; but being a case in the Supreme Court of the United States, I would not say it, of course.

The general rule is, that in an action upon a sealed instrument in a court of law, failure of consideration, or fraud in the consideration, for the purpose of avoiding the obligation, is not admissible as between the parties and privies to the deed; and, more especially, when there has been a part execution of the contract. The difficulties are in adjusting the rights and equities of the parties in a court of law; and hence, in States where the two systems of jurisprudence prevail, of equity and the common law, a court of law refuses to open the question of fraud in the consideration, or in the transaction out of which the consideration arises, in a suit upon the sealed instrument—

There is the whole thing—

"But turns the party over to a court of equity, where the instrument can be set aside upon such terms as, under all the circumstances, may be equitable and just between the parties. A court of law can hold no middle course; the question is limited to the validity or invalidity of the deed. Fraud in the execution of the instrument had always been admitted in a court of law, as where it has been misread, or some fraud or imposition has been practiced upon the party in the procuring of his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence."

Now, what does that mean? I have examined the cases upon which this question has been decided, including the cases in New York, in 5 Cowan and 4 Wendell, and Sargeant and Rawle. Those are the cases upon which the Supreme Court bases its authority. It was somewhat of a surprise to me, because where you have a plea of *non est factum*, it has always been supposed that anything could be shown that

would prove that the instrument had been drawn, conceived or perpetrated in fraud. I supposed that was one of the well-settled principles of the common law, that under that pleading you could show that an instrument was absolutely void on the ground of fraud. But in examining the cases upon which it is based, I find there is no escape that I can see, so far as this principle here is concerned, because in the New York cases and these other authorities to which the case in 102 United States refers, the question came up distinctly upon the basis of principal and surety, and the courts held that where it was an instrument under seal, the consideration could not, at law, be attacked even for fraud in its inception, and that they would have to go into a court of equity.

Therefore it appears clear to my mind that when the Supreme Court decided those cases, it meant exactly what it seems to say, that upon a sealed instrument you cannot attack the consideration for fraud—that is, you cannot show that the instrument was the outgrowth of fraud by reason of which the instrument was executed. I thought at first that perhaps it was a question of deeds. But in looking at these cases it is laid down with perfect plainness that it is because it is a sealed instrument, the seal importing a consideration, and that they will not permit an attack upon it in a court of law on the ground of fraud, except fraud perpetrated at the time of the execution, in substituting another paper, or in misreading the paper, or something of that character.

Perhaps I ought to say in passing that the State of New York by a statutory enactment has relieved the situation of any such contention as that. In the State of Maryland, from almost the earliest reports, it seems that they could attack for fraud, under the theory, I suppose, of *non est factum*, that it was absolutely void. If it was merely voidable, then it would have to be specially pleaded in order to raise that question.

Now, the holding of the Supreme Court of the United States being what it is, this court is bound by it unless there is some differentiation which the court can find. I will say very frankly that I cannot find it, although I have tried to do so.

Of course, generally speaking, this case is similar to the Philadelphia case, but in its presentation it is absolutely at variance and different, provided the evidence introduced is proper evidence. The authority by which this court feels

itself bound is the Supreme Court case, and in order to get rid of it we must find a differentiation in a Supreme Court case. Counsel has suggested several cases, one in 8 Howard, one in 120 U. S., one in 156 U. S., and other cases were suggested. I have examined these cases carefully. In no one of them can I find in the first place that there was any sealed instrument involved. I suspect that perhaps the case back in 8 Howard was that of a sealed instrument. It does not say so, but I suspect it was, because in those early days insurance policies were largely under seal. In more recent years we all know that they are never under seal, that they have a standard policy which is not under seal.

But those were entirely different cases. The case in 8 Howard would seem to be, as perhaps all the other cases were, upon insurance policies in which the applications were made part of the policy, and if they were warranties they would void the policy; if they were misrepresentations only, the question, of course, would go to the jury to find out whether they were material or not.

The case in 8 Howard, if I now recall it, was based upon the fact that in the picking room they kept certain coal-oil lamps burning. On an examination of the case you will find there was a representation that the picking room was within the building insured; but the distinct representation in the policy was that there were no lamps kept in the picking room. Therefore, when the defense was made that what they had represented was not true, to wit: that whilst the picking room was within the building, there were no lamps in it; and the policy, making the application a part of the contract, of course in a suit upon the policy, the application being a part of it, it was inevitable that if that assertion was untrue, it went straight to the contract itself. That would seem to my mind in no wise akin to the principle involved here; and the same is true in the other cases.

I have looked as carefully as I could to find some suggestion that under a sealed instrument you may offer proof, in a case involving some fiduciary relation, to show that the bond was secured by means of fraud, or fraudulent representations.

The only United States Supreme Court cases that have been suggested to the court are those involving questions of insurance, and all are made the subject of representations contained in the application.

So, gentlemen, when the Supreme Court of the United States has stated the law so plainly, it does not seem to me that this court is able to escape the very language of the Supreme Court itself as to the intent and purpose of the court, based upon cases in which the question of principle and surety were involved, and in which the whole thing apparently was dependent upon the sanctity which not so very many years ago was assumed to surround a sealed instrument; although I suppose most of us were under the impression that in these days that rule was no longer enforced. But this being the case, the court is unable to see how this evidence which has been submitted in support of the allegation of fraud is permissible, and I shall therefore have to grant the motion to strike out all the testimony which was taken subject to exception, and at the same time overrule the prayers of the defendant.